United States Court of Appeals

for the Second Circuit



APPELLANT'S APPENDIX

ORIGINAL

76-7190

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

Docket No. 76-7190

WESTON FUNDING CORPORATION,

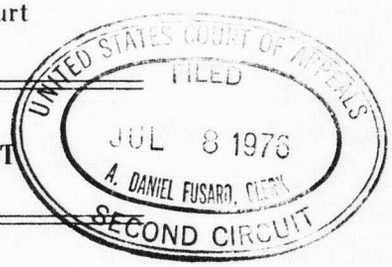
Plaintiff-Appellant,

vs.

LAFAYETTE TOWERS, INC., a corporation of the State of New Jersey, and GEORGE C. PECK,

Defendant-Appellees.

Appeal from the United States District Court
for the Southern District of New York



APPENDIX ON BEHALF OF APPELLANT

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DOCKET ENTRIES

Date	Nr.	Proceedings
03-17-75	-1-	Filed complaint and issued summons.
04-03-75	-2-	Filed summons and Marshals return - served: Lafayette Towers, Inc. by George C. Peck on 3-27-75; George C. Peck on 3-27-75.
05-07-75	-3-	Filed ANSWER of defts. K&Z
08-04-75	-4-	Filed defts affdvt. and notice of motion for summary judgment - ret. 8-22-75.
09-02-75	-5-	Filed stip. and order adj. deft's motion for summary judgment to 9-26-75 -- Carter, J.
09-25-75	-6-	Filed pltf's memorandum in opposition to defts' motion for summary judgment.
09-25-75	-7-	Filed pltf's affdvt. of Eliot R. Weston in opposition to defts' motion for summary judgment.
03-09-76		Filed Opinion #44022....Accordingly, Pltff's action is barred here under both collateral estoppel and res judicata and defts' motion for summary judgment must be granted. It is so Ordered... Carter, J. mn
03-11-76		Filed Judgment....Ordered that defts Lafayette Towers, Inc. and G. C. Peck, have judgment against pltff Weston Funding Corp. dismissing the complt....R.F.Burghardt, Clerk.
04-08-76		Filed Pltff's Notice of Appeal to USCA from Final Judgment ent. 3-11-76... mn to Kane & Zucker on 4-9-76.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

File No. 75 Civ 1305

WESTON FUNDING CORPORATION,

Plaintiff,

-against-

LAFAYETTE TOWERS, INC., a corporation of the State of New Jersey, and GEORGE C. PECK,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that WESTON FUNDING CORPORATION, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the final judgment entered in this action on the 11th day of March, 1976.

New York, N.Y.
April 8, 1976

ALBERT B. GINS
Attorney for Plaintiff, Weston Funding Corporation
36 West 44th Street
New York, N.Y. 10036
212-MU-2-2227

TO:
Clerk, U.S. District Court for the Southern District of N.Y.

Kane & Zucker, Esqs.
Attorneys for Defendants,
Lafayette Towers, Inc. and
George C. Peck

JUDGMENT DISMISSING THE COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

WESTON FUNDING CORPORATION

Plaintiff

-against-

LAFAYETTE TOWERS, INC., a corporation of the State of New Jersey, and GEORGE C. PECK

Defendants

----------X

75 Civil 1305 (RLC)

JUDGMENT

Defendants having moved the Court for summary judgment, pursuant to Rule 56, of the Federal Rules of Civil Procedure, and the said motion having come on to be heard before the Honorable Robert L. Carter, United States District Judge, and the Court thereafter on March 9, 1976, having handed down its opinion granting the said motion, it is,

ORDERED, ADJUDGED and DECREE: That defendants Lafayette Towers, Inc., and GEORGE C. PECK, have judgment against plaintiff WESTON FUNDING CORPORATION, dismissing the complaint.

Dated: New York, N.Y.
March 11, 1976

Raymond F. Burghardt
Clerk

Filed:
March 11, 1976

OPINION OF JUDGE CARTER ON MOTION FOR SUMMARY JUDGMENT DISMISSING COMPLAINT

O P I N I O N

Defendants have moved, pursuant to Rule 56, F.R.Civ.P., for summary judgment on the grounds of res judicata. For the reasons set out below, the motion is granted.

Prior Proceedings

This is an action for brokerage commissions brought by plaintiff Weston Funding Corp. ("Weston"), a New York corporation, against defendants Lafayette Towers, Inc. ("Lafayette"), a New Jersey corporation, and George C. Peck, Lafayette's sole shareholder, a New Jersey resident. On November 1, 1973, the plaintiff corporation and the defendants entered into an agreement whereby Weston was given the exclusive right and authorization (for a period of seven days) to obtain a standby commitment for end loans in the sum of $4,500,000 relative to the financing of Lafayette Towers. Weston was to receive as compensation an amount equal to 3-1/4% of the total commitment, such sum to be deemed earned and payable when the letter of commitment was issued. This agreement was signed by Peck on behalf of Weston and was extended orally by the defendants.

By February, 1974, Weston was finally successful in obtaining a written construction loan commitment from the First National State Bank of New Jersey for the full sum of $4,500,000. On February 25, 1974, Weston wrote to Peck to inform him of the loan commitment. The letter went on to recite as follows:

> "CONFIRMING OUR AGREEMENT AND UNDERSTANDING THE AMOUNT OF $191,250 HAS BEEN EARNED AND IS DUE AND PAYABLE TO WESTON FUNDING CORPORATION FOR THEIR BROKERAGE SERVICES IN THIS MATTER.
>
> "YOUR SIGNATURE BELOW IN BOTH PLACES WILL CONSTITUTE YOUR ACCEPTANCE AS AN INDIVIDUAL, AND, FOR THE CORPORATION."

At a subsequent meeting in New Jersey, Peck signed the letter as "accepted and approved" on behalf of himself and Lafayette. Peck then produced a check in the sum of $25,000 as partial payment of the commission due to Weston. The defendants have made no further payments pursuant to the November 1, 1973, agreement. It is plaintiff's contention that the defendant subsequently used the loan commitment obtained by Weston as a springboard to obtain loans from different sources without the plaintiff's knowledge.

On May 21, 1974, Weston filed a complaint in the United States District Court for the District of New Jersey (Civil Action No. 74-746), alleging the facts as stated above and demanding the balance allegedly due for their brokerage services in the amount of $166,250, together with interest and costs. On June 22, 1974, defendants filed an answer and counterclaim, followed by a motion for summary judgment filed on September 21, 1974. On November 6, 1974, Judge James A. Coolahan granted summary judgment in favor of defendants on the grounds that under New Jersey law only brokers licensed in New Jersey could bring suit for commissions in the courts of that state, and that plaintiff was not so licensed. Weston then filed a notice of appeal from the grant of summary judgment in defendants' favor. On March 18, 1975, however, the parties stipulated to a dismissal of the appeal. In May, 1975, Weston filed a new action in the Southern District of New York realleging the same facts and causes of action as in the prior New Jersey action. [1] Defendants

---

[1] See note 4, infra.

answered and have now brought on the instant motion for summary judgment. [2/]

2/

The defense of res judicata, while contained in the list of affirmative defenses in F.R.Civ.P. 8(c), is not specified as a ground for a pretrial motion to dismiss pursuant to Rule 12(b), F.R.Civ.P., or for summary judgment pursuant to Rule 56, F.R.Civ.P. Nevertheless, it has generally been held in this circuit that in the interest of efficient and expeditious judicial administration, the defense of res judicata can be raised and considered at the pretrial stage. Thistlethwaite v. City of New York, 362 F. Supp. 88, 91 (S.D.N.Y. 1973), aff'd, 497 F. 2d 339 (2d Cir.) cert. denied, 419 U.S. 1093 (1974); Katz v. State of Connecticut, 307 F. Supp. 480, 483 (D. Conn. 1969), aff'd, per curiam 433 F. 2d 878 (2d Cir. 1970); see Southard v. Southard, 305 F. 2d 730, 732 (2d Cir. 1962). See generally, 5 Wright & Miller, Federal Practice and Procedure §1360 (1969 ed.). This is particularly true where, as here, the issue is raised by way of motion for summary judgment so that the plaintiff is provided with an adequate opportunity to present arguments rebutting the defense. See Kaufman v. Somers Board of Education, 368 F. Supp. 28, 31-2 (D. Conn. 1973); 5 Wright & Miller, Federal Practice and Procedure §1277 (1969 ed.)

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Discussion

I.

It is well settled that for a judgment in a prior action to be a bar to reaching the merits in a subsequent action the following elements must be established. First, the prior judgment must have been rendered by a court of competent jurisdiction; second, the prior judgment must have been a final judgment on the merits; and third, the same cause of action and the same parties or their privies must have been involved in both suits. 3/

I have no difficulty in deciding that the first and third of these elements have been satisfied. 4/

3/ Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); Cromwell v. County of Sac, 94 U.S. 351, 352-353 (1877); Herendeen v. Champion International Corporation, 525 F. 2d 130, 133 (2d Cir. 1975); Speed Products Co. v. Tinnerman, 222 F. 2d 61 (2d Cir. 1955).

4/ As to the first element, there is no dispute that the court was fully competent to decide the controversy before it. As to the third element, however, plaintiff suggests that the instant action is founded upon a new cause of action since the complaint rests upon the violation of the November 1, 1973 agreement, whereas the New Jersey complaint was brought

(Footnote continued)

II.

The second element--whether the prior judgment is deemed to be "on the merits" requires further elaboration.

(Footnote continued from previous page)

with respect to the letter of agreement dated February 25, 1974. This contention is without merit. It is clear that the letter of February 25, 1974 merely provided a precise calculation for the formula already agreed upon, as evidenced by the agreement of November 1, 1973. Regardless of whether plaintiff chooses to sue with respect to a document that sets forth the precise terms of his agreement with the defendants, or with respect to a later executed document which reflects in dollar figures the same terms as were initially agreed upon, plaintiff's cause of action remains the same. As the Second Circuit recently noted:

> "The test for determining whether causes of action are the same for purposes of res judicata has been variously expressed. Most frequently cited as the relevant criteria by both this court and the New York courts are [1] whether a different judgment in the second action would impair or destroy rights or interests established by the judgment entered in the first action, [2] whether the same evidence is necessary to maintain the second cause of action as was required in the first, and [3] whether the essential facts and issues in the second were present in the first."
> (footnotes omitted)

Herendeen v. Champion International Corporation, supra, 525 F. 2d at 133-34. See also, McNellis v. First Federal Savings & Loan Ass'n of Rochester, N.Y., 364 F. 2d 251 (2d Cir.), cert. denied, 385 U.S. 970 (1966); DeCoss v. Turner & Blanchard, Inc.,

(Footnote continued)

The requirement that a judgment, to be res judicata, must be rendered "on the merits" guarantees to every plaintiff the right once to be heard on the substance of his claim.

> "Thus, ordinarily, the doctrine may be invoked only after a judgment has been rendered which reaches and determines 'the real or substantial grounds of action or defense as distinguished from matters of practice, procedure, jurisdiction or form,' Clegg v. United States, 112 F. 2d 886, 887 (10th Cir. 1940), and, at common law, a dismissal on a ground which did not resolve the substantive merit of the complaint was not a bar to a subsequent action on the same claim. Hughes v. United States, 4 Wall. 232, 71 U.S. 232, 237, 18 L.Ed. 303 (1865); Halderman v. United States, 91 U.S. 584, 585-586, 23 L.Ed. 433 (1876)."
> Saylor v. Lindsley, 391 F. 2d 965, 968 (2d Cir. 1968).

Rule 41(b), F.R.Civ.P., operates as an exception to this general principle.

(Footnote continued from previous page)

267 N.Y. 207, 211, 196 N.E. 28, 30 (1935). Under any of these formulations--most particularly under the second--it is apparent that the cause of action before the United States District Court for the District of New Jersey is identical with the cause of action now before this court.
(end of footnote)

The last sentence of that Rule provides as follows:

> "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

Thus, if the court does not specify that a dismissal is without prejudice, as Judge Coolahan did not specify, and if the dismissal is not embraced within one of the three exceptions to Rule 41(b), the dismissal will be deemed to be with prejudice--i.e., an adjudication on the merits barring a second suit. See Kern v. Hettinger, 303 F. 2d 333, 340 (2d Cir. 1962); see generally, 9 Wright & Miller, Federal Practice and Procedure §2373 (1971 ed.)

There are three stated exceptions to the rule that a dismissal is with prejudice unless the court otherwise specifies--Rule 41(b) does not apply to a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19. In Costello v. United States, 365 U.S. 265 (1961), the Supreme Court refused to construe narrowly the lack of jurisdiction exception to Rule 41(b). The court, per Justice Brennan, held:

> "It is too narrow a reading of the exception to relate the concept of jurisdiction embodied [in Rule 41(b)] to the fundamental jurisdictional defects which render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter. We regard the exception as encompassing those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim." 365 U.S. at 285.

The Court went on to note that at common law dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim and could "not discern in Rule 41(b) a purpose to change this common-law principle with respect to dismissals in which the merits could not be reached for failure of the plaintiff to satisfy a precondition." The Court therefore concluded that:

> "All of the dismissals enumerated in Rule 41(b) which operate as adjudications on the merits--failure of the plaintiff to prosecute, or to comply with the Rules of Civil Procedure, or to comply with an order of the Court, or to present evidence showing a right to the relief on the facts and the law--primarily involve situations in which the defendant must incur the inconvenience of preparing to meet the merits because there is no initial bar to the Court's reaching them. It is therefore logical that a dismissal on one of these grounds should, unless the Court otherwise specifies, bar a subsequent

> action. In defining the situations where dismissals 'not provided for in this rule' also operate as adjudications on the merits, and are not to be deemed jurisdictional, it seems reasonable to confine them to those situations where the policy behind the enumerated grounds is equally applicable."
> 365 U.S. at 286.

In light of the Costello decision, this circuit has recognized that Rule 41(b) does not apply in situations in which an action is dismissed because of some initial bar to reaching the merits of plaintiff's claims. Thus, in Saylor v. Lindsley, 391 F. 2d 965, 969 (2d Cir. 1968), the court held that a dismissal for failure to post a bond-for-costs would not call for the application of Rule 41(b) and would not constitute an adjudication on the merits so as to bar a subsequent suit. See 9 Wright & Miller, Federal Practice and Procedure §2373 (1971 ed.) Cf. Nasser v. Isthmian Lines, 331 F. 2d 124, 127 (2d Cir. 1964).

In my view, the rationale of Costello prevents the court from blindly or talismanically labelling a dismissal as one with or without prejudice, requiring instead a rigorous and thorough examination of the grounds for dismissal.

Accordingly, we must proceed to consider more fully the substance of defendants' res judicata defense.

III.

As I read his opinion, two issues were raised and decided by Judge Coolahan in the New Jersey action. First, he concluded that the transaction's contacts with New Jersey were sufficient to warrant the application of New Jersey law to the controversy. Second, Judge Coolahan concluded that under New Jersey law the plaintiff was precluded from maintaining his cause of action in the New Jersey courts and hence granted defendants' motion for summary judgment. In particular, the federal trial court relied on Section 2 of the New Jersey Real Estate Brokers Licensing Act, N.J.S.A. 45:15-1, et seq. (1963), which provides, in pertinent part, as follows:

> "No person, firm, partnership, association or corporation shall bring or maintain any action in the courts of this State for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and proving that he was a duly licensed real estate broker at the time the alleged cause of action arose." [N.J.S.A. 45:15-3]

N.J.S.A. 45:15-3 defines a real estate broker as, among others,

> " ... a person, firm or corporation who, for a fee, commission ... lists for sale, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase ... of real estate ... or offers or attempts or agrees to negotiate a loan secured or to be secured by mortgage ... ."

It was undisputed that plaintiff was not a licensed broker in New Jersey. Furthermore, the court, relying on New Jersey case law, [5] rejected plaintiff's argument that he was a "finder" rather than a "broker" and hence not precluded by the operation of the New Jersey statute.

Regardless of the characterization of the prior dismissal the instant motion must be barred. As has been noted, Judge Coolahan determined that New Jersey law--including the New Jersey Real Estate Brokers Licensing Act--would be applied to the controversy. This determination is binding in subsequent litigation between the parties as a matter, strictly speaking, not of res judicata, but of collateral estoppel or "issue preclusion." Section 68 of the Restatement of

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[5] See Corson v. Keane, 4 N.J. 221, 72 A. 2d 314 (1950).

the Law, Second, Judgments (Tentative Draft No. 1, 1973), sets out the general rule of issue preclusion as follows:

> "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. [6]

The issue of what state law would be applied to the controversy was raised and litigated in the prior action and determination of that question formed the foundation on which the grant of summary judgment rested.

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6 /

Even where a judgment for the defendant is not on the merits and plaintiff is not precluded thereby from maintaining a new suit on the same cause of action, he is nonetheless precluded from relitigating questions litigated and decided in the prior action. Restatement of the Law, Judgments, §49, comment b, at 195 (1942); see, Restatement of the Law, Second, Judgments, (Tentative Draft No. 1, 1973) §48.1, comment b. See also, In re Kauffman Mutual Fund Actions, 479 F. 2d 257, 267 (1st Cir.), cert. denied, 414 U.S. 857 (1973); Acree v. Air Line Pilots Association, 390 F. 2d 199, 203 (5th Cir.), cert. denied, 393 U.S. 852 (1968).

Plaintiff's recourse was to challenge the application of New Jersey law to the controversy and to urge instead that New York law applied. [7] Plaintiff did not seek to appeal Judge Coolahan's decision. His ruling, however, cannot now be relitigated--here, or in any other federal court for that matter. Cf. Sun Sales Corporation v. Block Land, Inc., 456 F. 2d 857, 861 (3rd Cir. 1972). [8]

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[7] There is apparently no dispute that plaintiff is a licensed broker in New York and would not have been barred from suing in New York by virtue of §442-d of the New York Real Property Law.

[8] In Sun Sales, supra, the Third Circuit reversed (on grounds not applicable to this case) the decision of the district court which had granted defendants' motion to dismiss on the grounds of res judicata. In reversing, the court emphasized that the diversity jurisdiction of the federal courts is a matter of particular federal interest based on the grant of judicial power contained in Article III, Section 2 of the Constitution, and that the scope of that jurisdiction must be determined at the federal and not the state level. See Sun Sales Corporation v. Block Land, Inc., supra, 456 F. 2d at 862; Szantay v. Beech Aircraft Corp., 349 F. 2d 60 (4th Cir. 1965). This jurisdictional determination, however, has been made by the New Jersey federal court. Judge Coolahan's decision to apply the New Jersey Real Estate Brokers Licensing Act was more than a simple choice

(Footnote continued)

IV

Even if the conflict of laws decision in the prior action was not binding on this court as a matter of collateral estoppel, the instant motion must nonetheless be granted on res judicata grounds. This is so since the dismissal entered by Judge Coolahan must be deemed to be a judgment "on the merits".

Section 49 of the Restatement of the Law, Judgments (1942), comment a, provides as follows:

(Footnote continued from previous page)

of law. It was, at least implicitly, a deferral to a legitimate state policy, the effect of which was to limit the jurisdiction of the federal court. That determination cannot be relitigated here. Again, plaintiff's recourse was to appeal the dismissal entered by the federal district court.
(end of footnote)

"Judgment not on the merits. A judgment for the defendant is not on the merits where it is based merely on rules of procedure rather than on rules of substantive law. If the judgment determines that the plaintiff has no cause of action, it is on the merits; but if it determines only that the plaintiff is not entitled to recover in the particular action, it is not on the merits. If the defendant, whether on demurrer, motion, verdict or otherwise, obtains judgment in his favor on a ground not involving the substance of the plaintiff's cause of action, the cause of action is not extinguished thereby. This is the case, for example, where the judgment is based on the lack of jurisdiction of the court over the defendant or over the subject of the action, on the plaintiff's lack of capacity to sue, on the pendency of a prior action, on the misjoinder or nonjoinder of parties or on the misjoinder of causes of action." [9]

9/ Section 49 of the First Restatement, Judgments was substantially readopted by the Reporters in §§48 and 48.1, Restatement of the Law, Second, Judgments (Tentative Draft No. 1, 1973). Section 48 of the Tentative Draft provides that "[a] valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim", except as provided in §§48.1 and 61.2. Section 48.1 provides that:

> (1) A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim:
>
> (a) When the judgment is one of dismissal for lack of jurisdiction, for improper venue, or for nonjoinder or misjoinder of parties;
>
> ...
>
> (2) A valid and final personal judgment for the defendant which rests on the prematurity of the action or on the plaintiff's failure to

(Footnote continued)

Section 110 of the Restatement of the Law (Second), Conflict of Laws (1969), and the Comment thereto, is of like import. Section 110 provides as follows:

> "A judgment that is not on the merits will be recognized in other states only as to issues actually decided."

Comment (a) to Section 110 provides:

> "A judgment is not on the merits when it does not involve the substance of the plaintiff's cause of action. So a judgment for the defendant is not on the merits if it is based on the court's lack of jurisdiction or of competence over the subject matter of the controversy, on improper venue, on the plaintiff's lack of capacity to sue, on the pendency of a prior action, on the misjoinder or non-joinder of parties or on the misjoinder of causes of action. A judgment for the defendant is also not on the merits if it is based on the ground that the plaintiff's action is barred by the forum's statute of limitations or on the ground that it would be contrary to the public policy of the forum to entertain the action."

See also Saylor v. Lindsley, 391 F. 2d 965 (2d Cir. 1968) (dismissal of a prior derivative action by a stockholder for failure to post a bond for costs did not operate as an adjudication on the merits and was

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(Footnote continued from previous page)

satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied, unless a second action is precluded by operation of the substantive law, or the circumstances are such that it would be manifestly unfair to subject the defendant to such an action.
(end of footnote)

not res judicata with respect to a subsequent derivative action brought by another stockholder against the same defendants); Warner v. Buffalo Drydock Co., 67 F. 2d 540 (2d Cir. 1933) (dismissal of an action by one court as barred by laches did not bar recovery in another court); see generally, Paulsen and Sovern, "Public Policy" in the Conflict of Laws, 56 Colum.L.Rev. 969, 1010-1011 (1956).

Is N.J.S.A. 45:15-3 a rule of substantive law? I believe that it is. Section 442-d of the New York Real Property Law is almost identical to the New Jersey statute relied upon by Judge Coolahan in dismissing the action before him. Section 442-d provides, in pertinent part as follows:

> "No person copartnership or corporation shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered, in any place in which this article is applicable, in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose."

This statute has been found to be part of the substantive law of New York. See Meltzer v. Crescent Leaseholds, Ltd., 442 F. 2d 293, 295 (2d Cir. 1971). As

such, it would be applied by a New York federal court sitting in diversity, Meltzer, supra, affirming 315 F. Supp. 142 (S.D.N.Y. 1970), as well as by a federal court sitting in another state that has chosen to apply New York law to the controversy. Backar v. Western States Producing Company, 382 F. Supp. 1170, 1173 (W.D. Tex. 1974).

There is no reason to suspect that the New Jersey statute is any less a substantive pronouncement than its New York counterpart. The rationale underlying Section 45:15-3 of the Real Estate Brokers Act was stated by the New Jersey Supreme Court as follows:

> "In our judgment, however, the legislative objective in closing the courts to the unlicensed broker was to establish a policy so strong that neither the contract nor the unlawful efforts made in its pursuit could provide the basis of pecuniary benefit to him ... ." Tanenbaum v. Sylvan Builders, Inc., 29 N.J. 63, 148 A.2d 176, 181 (1959).

The licensing act, said the court, "is a regulatory measure and represents the strong public policy of our state". Tanenbaum, supra, 148 A.2d at 181.

Since the judgment of the New Jersey court in the prior action was a judgment "on the merits", the issues raised therein may not be relitigated.

v.

Furthermore, this case is governed, I believe, by the doctrine announced by Mr. Justice Frankfurter in Angel v. Bullington, 330 U.S. 183 (1947). The facts of that case are simple. Bullington, a citizen of Virginia, sold land in Virginia to Angel, a citizen of North Carolina. Only part of the purchase price was paid. For the balance, Angel executed a series of notes secured by a deed of trust on the land. Upon default on one of the notes, Bullington, acting upon an acceleration clause in the deed, caused all other notes to become due and called upon the trustees to sell the land. The sale was duly made in Virginia and the proceeds of the sale applied to the payment of the notes. Bullington then brought suit in the state courts of North Carolina to collect the deficiency. Angel countered with a demurrer, arguing that the suit was barred by virtue of a North Carolina statute which precluded recovery of deficiency judgments. The Superior Court of North Carolina overruled the demurrer; the Supreme Court of North Carolina reversed, holding that the North Carolina statute barred the suit, and the action was dismissed. Rather than appealing the dismissal, Bullington sued for the deficiency in the

United States District Court for the Western District of North Carolina. Angel pleaded in bar the judgment in the North Carolina action. The District Court gave judgment for Bullington and the Court of Appeals for the Fourth Circuit affirmed. The Supreme Court granted certiorari and reversed the decision on the ground that the North Carolina state court judgment barred the subsequent relitigation of the action in the federal court in the same state. Mr. Justice Frankfurter, speaking for the majority, opined as follows:

> "It is suggested that the North Carolina Supreme Court did not adjudicate the 'merits' of the controversy. It is a misconception of res judicata to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the State. Such a situation is presented when the first decision is based not on the ground that the distribution of judicial power among the various courts of the State requires the suit to be brought in another court in the State, but on the inaccessibility of all the courts of the State to such litigation. And that is the essence of the present case. The only issue in controversy in the first North Carolina litigation was whether or not all the courts of North Carolina were closed to that litigation. The merits of that issue were adjudicated. And that was the issue raised in the second litigation in North Carolina--that in the federal district court. The merits of this issue having been adjudicated, they cannot be relitigated." 330 U.S. at 190.

It is clear then that if a state court is closed to a party, the federal diversity court is likewise closed. The result should be no different because the plaintiff has chosen to relitigate in a new forum rather than moving from state to federal court within the same jurisdiction.

Accordingly, plaintiff's action is barred here under both collateral estoppel and res judicata and defendants' motion for summary judgment must be granted.

It is SO ORDERED.

Dated: New York, New York
March 9, 1976

Robert L. Carter
ROBERT L. CARTER
U.S.D.J.

COMPLAINT IN NEW YORK FEDERAL DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

WESTON FUNDING CORPORATION,

Plaintiff,

-against-

LAFAYETTE TOWERS, INC., a corporation of the State of New Jersey, and GEORGE C. PECK,

Defendants.

JUDGE CARTER

CIVIL ACTION
NO. 75 CIV 1305

COMPLAINT

FIRST COUNT

1. The plaintiff, WESTON FUNDING CORPORATION, a domestic corporation, organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business at 1 Rockefeller Plaza, New York, New York 10020, complaining of the defendants, alleges:

2. Plaintiff is duly licensed as a real estate broker under and by virtue of the laws of the State of New York.

3. The defendant, LAFAYETTE TOWERS, INC., is a foreign corporation, organized and existing under and by virtue of the laws of the State of New Jersey, and having its principal place of business at 180 Lafayette Avenue, Passaic, New Jersey.

4. The defendant, GEORGE C. PECK, is a resident of the State of New Jersey, with offices located at 1200 Route #46, Clifton, New Jersey 07013.

5. On or about November 1, 1973, the defendants entered into a written agreement with the plaintiff, whereby said defendants gave plaintiff the exclusive right and authorization for a period of seven (7) days to obtain a standby commitment for end loans in the total sum of $4,500,000. with respect to premises LAFAYETTE TOWERS located at 180 Lafayette Avenue, Passaic, New Jersey. A copy of said agreement is annexed hereto as Exhibit A.

6. Said written agreement was duly executed by the plaintiff and defendants at the offices of the plaintiff corporation at 1 Rockefeller Plaza, New York, New York, on November 1, 1973.

7. At the expiration of the seven (7) days provided for in Exhibit A, the defendants orally and by their acts continued, to and including February, 1974, to authorize the plaintiff to obtain the aforesaid commitment in the amount of $4,500,000.

8. During said period from November 1, 1973 to and including February, 1974, the plaintiff attempted to obtain the standby commitment for an end loan in the total sum of $4,500,000. from various lending institutions and trusts located in New York, New Jersey, and divers other states and countries.

9. On or about February 25, 1974, plaintiff advised defend-

ants that it had obtained a construction and interim loan commitment from the First National State Bank of New Jersey in the sum of $4,500,000.

10. Thereupon, plaintiff prepared an agreement with the defendants dated February 25, 1974 wherein defendants agreed to pay the plaintiff the sum of $191,250. for the brokerage services rendered by the plaintiff to the defendants.

11. Plaintiff requested the defendants to come to its New York offices at 1 Rockefeller Plaza in New York City to sign the said agreement, a copy of which is attached hereto as Exhibit B, but defendant, GEORGE C. PECK, pleading inconvenience and inability to come to New York on that date, namely, February 25, 1974, requested plaintiff to oblige him and meet him at a place in New Jersey, namely, the Holiday Inn located on Route 3, where said defendants would execute the aforesaid agreement dated February 25, 1974.

12. The meeting between the plaintiff and the defendants on February 25, 1974 took place as aforesaid in New Jersey at the specific instance and request of the defendants, and was merely for the convenience of the defendants; all other transactions between the plaintiff and the defendants having taken place in New York City.

13. Pursuant to the provisions of said agreement between the plaintiff and the defendants dated February 25, 1974, the defendants executed and delivered to the plaintiff a deposit of $25,000. on account,

leaving a balance due and owing to the plaintiff of $166,250.

14. Plaintiff has performed all of the terms and conditions on its part to be performed, and has repeatedly demanded of the defendants the balance due for its services in the amount of $166,250.

15. The defendants, and each of them, have failed and refused to pay the balance remaining for the services rendered, as aforesaid.

WHEREFORE, plaintiff demands judgment against the defendants, jointly and severally, in the amount of $166,250., together with interest and costs of suit.

SECOND COUNT

16. Plaintiff repeats and realleges each and every allegation of the First Count as though fully set forth at length herein.

17. Plaintiff has performed brokerage services for the defendants, the reasonable value of which totals $191,250.

18. The defendants have paid on account to the plaintiff the sum of $25,000., leaving a balance due and owing from the defendants to the plaintiff of $166,250.

19. Plaintiff has repeatedly demanded payment of said balance of $166,250. from the defendants, but said defendants have failed and refused to pay the reasonable value of the services rendered, as aforesaid.

WHEREFORE, plaintiff demands judgment against defendants in the amount of $166,250. with interest and cost of suit.

THIRD COUNT

20. Plaintiff repeats and realleges each and every allegation of the First and Second Counts as though fully set forth at length herein.

21. Plaintiff has rendered certain brokerage services to the defendants.

22. As a result of the services rendered by the plaintiff, the First National State Bank of New Jersey issued to the defendants a construction and interim loan commitment in the sum of $4,500,000.

23. The defendants have wilfully and in derogation of their agreements with the plaintiff attempted to and did place a loan elsewhere, using the above-mentioned construction and loan commitment to the First National State Bank of New Jersey as a credit reference.

24. The defendants have attempted and have accepted the benefits of the construction and interim loan commitment above-mentioned, and have attempted to and did obtain a loan elsewhere, thereby accepting the benefits of the services rendered by the plaintiff without accepting the loan commitment obtained by the plaintiff, and without paying for the brokerage services rendered, excepting only the sum of $25,000.

25. By reason of their actions, the defendants have been un-

justly enriched in that they have succeeded in obtaining a construction and interim loan commitment without paying in full for the brokerage services rendered by the plaintiff to the defendants.

WHEREFORE, plaintiff demands judgment against the defendants, jointly and severally, together with interest, costs of suit and punitive damages.

FOURTH COUNT

26. Plaintiff repeats and realleges each and every allegation of the First, Second and Third Counts, as though fully set forth at length herein.

27. The defendants have acted with malice, with the purpose of causing damage and injury to the plaintiff's business interests, and have wilfully, without justification and in bad faith, interfered with the plaintiff's attempt to place a construction and interim loan commitment for the defendants.

28. By reason of the defendants' wilfull and malicious interference with the plaintiff's business interests, as aforesaid, plaintiff has been damaged in the sum of $166,250.

WHEREFORE, plaintiff demands judgment against the defendants, jointly and severally, in the amount of $166,250., together with interest, costs of suit, punitive damages, and such other relief as to the Court may seem just and proper.



ALBERT B. GINS
Attorney for Plaintiff

EXHIBIT ATTACHED TO COMPLAINT IN NEW YORK FEDERAL DISTRICT COURT

WESTON FUNDING CORPORATION

Number One Rockefeller Plaza / New York, N.Y. 10020 / Telephone 212 581-8620

NOVEMBER 1, 1973

DR. GEORGE PECK
1200 ROUTE 46
CLIFTON, N.J. 07013

RE: LAYAFETTE TOWERS
180 LAFAYETTE AVE.
PASSAIC, N.J.

DEAR DR. PECK:

IN ACCORDANCE WITH OUR UNDERSTANDING, THE UNDERSIGNED GIVE WESTON FUNDING CORPORATION THE EXCLUSIVE RIGHT AND AUTHORIZATION FOR A PERIOD OF SEVEN (7) DAYS TO OBTAIN A STANDBY COMMITMENT FOR END LOANS IN THE TOTAL SUM OF $4,500,000 RELATIVE SUBJECT PROPERTY.

THE TERMS OF THE COMMITMENT ARE:

INTEREST RATE 8% - FOR 25 YEARS, WITH DISCOUNT PAID BY YOUR FIRM TO THE INSTITUTION AT PREVAILING RATE AT TIME OF CLOSING.

TOTAL FEES, AND COMPENSATION TO WESTON FUNDING CORPORATION, INCLUDING BROKERAGE, WILL BE 5⅓% OF THE TOTAL COMMITMENT.

THIS SUM SHALL BE DEEMED EARNED AND PAYABLE WHEN THE LETTER OF COMMITMENT IS ISSUED.

THE SUBJECT INSTITUTION IS CARTERET SAVINGS & LOAN ASSOCIATION, NEWARK, NEW JERSEY.

VERY TRULY YOURS,

WESTON FUNDING CORPORATION

ELIOT R. WESTON, PRESIDENT

ACCEPTED AND AGREED:

DR. GEORGE PECK

DR. GEORGE PECK

ANSWER IN NEW YORK FEDERAL DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

----------x

WESTON FUNDING CORPORATION,

Plaintiff,

CIVIL ACTION FILE
NO. 75 CIV 1305

-against-

LAFAYETTE TOWERS, INC., a corporation of the State of New Jersey, and GEORGE C. PECK,

JUDGE CARTER

ANSWER

Defendants.

----------x

Defendants, LAFAYETTE TOWERS, INC., a corporation of the State of New Jersey, and GEORGE C. PECK, having an office at 180 Lafayette Avenue, Passaic, New Jersey, answering the complaint filed against them, say:

FIRST COUNT

1. They neither admit nor deny the allegations contained in paragraph 1 and leave plaintiff to its proof.

2. They neither admit nor deny the allegations contained in paragraph 2 and leave plaintiff to its proof.

3. They admit the allegations contained in paragraph 3.

4. They admit the allegations contained in paragraph 4.

5. They deny the characterizations contained in paragraph 5 insofar as they refer to any written agreements, and instead refer to the entire original instrument in

response thereto.

6. They deny the allegations contained in paragraph 6.

7. They deny the allegations contained in paragraph 7.

8. They neither admit nor deny the allegations contained in paragraph 8 and leave plaintiff to its proof.

9. They neither admit nor deny the allegations contained in paragraph 9 and leave plaintiff to its proof.

10. They neither admit nor deny the allegations contained in paragraph 10 and leave plaintiff to its proof.

11. They deny the allegations contained in paragraph 11.

12. They deny the allegations contained in paragraph 12.

13. They deny the allegations contained in paragraph 13 except admit the payment of $25,000.00 and as to the characterizations of such payment, they leave the plaintiff to its proof.

14. They deny the allegations contained in paragraph 14 except admit that demands were made but aver that they were unjustified.

15. They deny the allegations contained in paragraph 15.

SECOND COUNT

1. Defendants repeat each and every answer to the First Count as if the same were repeated herein at length verbatim.

2. They deny the allegations contained in paragraph 17.

3. They deny the allegations contained in paragraph 18 except admit that they paid the sum of $25,000.00.

4. As to paragraph 19, they admit that they did not pay the plaintiff and aver that any such refusal is justified.

THIRD COUNT

1. Defendants repeat each and every answer to the First and Second Counts as if the same were repeated herein at length verbatim.

2. They neither admit nor deny the allegations contained in paragraph 21 but refer to the entire contractual instrument between the parties.

3. They neither admit nor deny the allegations contained in paragraph 22 but refer to the entire contractual instrument between the parties.

4. They deny that any attempt to place a loan elsewhere, as alleged in paragraph 23, was in derogation of any rights of plaintiff.

5. They deny the allegations contained in paragraph 24.

6. They deny the allegations contained in paragraph 25.

FOURTH COUNT

1. Defendants repeat each and every answer to the First, Second and Third Counts as if the same were repeated herein at length verbatim.

2. They deny the allegations contained in paragraph 27.

3. They deny the allegations contained in paragraph 28.

SEPARATE DEFENSES TO FIRST COUNT

1. The complaint should be dismissed by reason of plaintiff's failure to state a cause of action upon which relief may be had. The instrument between the parties provided that any monies to which plaintiff would otherwise be entitled should be earned and become due and payable upon the closing of the loan referred to in the instrument. Said loan never closed by reason of defendants' inability to meet certain contingencies which were not agreed to with plaintiff.

2. Plaintiff is estopped to deny the written express terms of the instrument between the parties, which instrument precludes plaintiff from maintaining this action.

3. The understanding and agreement of the parties

was that the monies would be deemed earned only in the event plaintiff was able to deliver an unconditional mortgage commitment or one with conditions that defendants could satisfy. Plaintiff failed to provide such a commitment. Accordingly, the instrument is void for want of consideration on the part of the plaintiff.

4. The claim of plaintiff is premature since no loan has closed with the bank in question, and, accordingly, should be dismissed with costs.

5. The instrument is void and illegal and is contrary to the statutes of the State of New Jersey, including but not limited to N.J.S.A.31:1-1, as well as the rules and regulations of the State of New Jersey Commissioner of Banking and Insurance, and the complaint should, therefore, be dismissed.

SEPARATE DEFENSES TO SECOND COUNT

1. Defendants repeat and incorporate herein all defenses to the First Count as though the same were repeated at length verbatim.

2. The sum demanded does not reflect the reasonable value of any services allegedly performed on behalf of defendants and, accordingly, complaint should be dismissed.

SEPARATE DEFENSES TO THIRD COUNT

1. Defendants repeat and incorporate herein all defenses to the First and Second Counts as though the same were repeated at length verbatim.

SEPARATE DEFENSES TO FOURTH COUNT

1. Defendants repeat and incorporate herein all defenses to the First, Second and Third Counts as though the same were repeated at length verbatim.

SEPARATE DEFENSES TO ALL COUNTS

1. The instrument upon which this suit is based was executed by defendants under conditions of economic compulsion and/or duress. Complaint should, therefore, be dismissed.

2. The instrument which is annexed to the complaint and upon which this suit is based was executed by plaintiff upon the understanding that no monies would be due until defendants would be able to fulfill any conditions imposed under the terms of the mortgage commitment. The conditions were not fulfilled by defendants. Therefore, the complaint should be dismissed.

3. Any enforceable agreement between the parties was between plaintiff and Lafayette Towers, Inc. only, and not the individual named defendant. Accordingly, the complaint should be dismissed as to George C. Peck.

4. The instrument which is annexed to the complaint does not reflect a true and complete agreement. The complaint should be dismissed.

5. The instrument annexed to the complaint was signed by defendants by reason of the duress and/or compulsion. Accordingly, the complaint should be dismissed with costs.

6. The transaction as stated by plaintiff in the complaint is illegal and unenforceable and void. The complaint should, therefore, be dismissed.

SEPARATE DEFENSES TO THE ENTIRE CAUSE OF ACTION OF THE PLAINTIFF HEREIN

1. That heretofore and on or about May 21, 1974, the plaintiff herein brought an action against the defendants in the United States District Court for the District of New Jersey, Civil Action File No. 74-746, for the recovery of the sum of $191,250.00 less the sum of $25,000.00 alleged to have been paid on account, leaving an outstanding balance of $166,250.00 allegedly due from the defendants to the plaintiff.

2. That the allegations contained in said complaint were based upon the same transaction as is contained in the several counts of the complaint herein, a copy of which complaint is annexed hereto and made a part hereof.

3. That thereafter an answer was interposed by the above named defendants, a copy of which is annexed hereto.

4. That a motion was made by the defendants for summary judgment against the plaintiff on the ground that there is no genuine issue as to any material fact and that the defendants are entitled to summary judgment as a matter of law.

5. That the motion came on to be heard before Honorable James A. Coolahan, United States District Judge,

District of New Jersey, and the said motion was granted, dismissing the complaint of the plaintiff.

6. That annexed hereto is a copy of the said opinion and order entered thereon.

7. That although a notice of appeal from the said order granting summary judgment herein was filed, thereafter on March 18,1975 the parties stipulated for a dismissal of such appeal without costs to either party as against the other.

8. By reason of the foregoing, the demand of the plaintiff set forth in the complaint in this action has been adjudicated and determined prior to the commencement of this action.

WHEREFORE, defendants demand judgment dismissing the complaint of the plaintiff herein, together with costs and disbursements of this action.

KANE & ZUCKER
Attorneys for Defendants

By _____
STANLEY ZUCKER, a member of the firm

Office & P.O. Address
401 Broadway
New York, New York 10013
Tel. No. 966-4244

TO: ALBERT B. GINS,ESQ.,
Attorney for Plaintiff
36 West 44th Street
New York, New York

EXHIBIT ATTACHED TO ANSWER TO NEW YORK COMPLAINT

Complaint in New Jersey Federal District Court

ORIGINAL FILED
MAY 21 1974
ANGELO W. LOCASCIO, CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 74-746

WESTON FUNDING CORPORATION, Plaintiff, v. LAFAYETTE TOWERS, INC., a Corporation of the State of New Jersey and GEORGE C. PECK, Defendants.	COMPLAINT

The plaintiff, a foreign corporation, having its principal place of business at 1 Rockefeller Plaza, New York, New York 10020, complains of the defendants as follows:

FIRST COUNT

1. Plaintiff is a New York corporation with its principal place of business located at 1 Rockefeller Plaza, New York, New York 10020.

2. The defendant, Lafayette Towers, Inc., is a New Jersey corporation with its principal place of business located at 180 Lafayette Avenue, Passaic, New Jersey.

3. The defendant, George C. Peck, M.D., is a resident of the State of New Jersey, with an office located at 1200 Route #46, Clifton, New Jersey, 07013.

4. Jurisdiction is in this Court by reason of 28 U.S.C. 1332.

5. The defendants entered into an agreement with the plaintiff on February 25, 1974 at which time they agreed to pay the plaintiff the amount of $191,250.00 for certain brokerage services performed by the plaintiff and paid a deposit of $25,000.00 receipt of which is acknowledged by the plaintiff. (A copy of said agreement is annexed hereto as Exhibit A).

6. Said services being performed, the plaintiff has repeatedly demanded of the defendants the balance due for said services in the amount of $166,250.00.

7. Despite repeated demands, the defendants have refused and continue to refuse to pay the balance remaining for the services rendered as aforesaid.

WHEREFORE, plaintiff demands judgment against the defendants, jointly and severally, in the amount of $166,250.00, together with interest and cost of suit.

SECOND COUNT

1. The plaintiff repeats all the allegations of the First Count as if set forth at length herein.

2. Plaintiff has performed certain services for the defendants, the reasonable value of which totals $191,250.00.

3. The defendants have paid on account $25,000.00, leaving an outstanding balance of $166,250.00 remaining.

4. Despite repeated demands, defendants have refused and continue to refuse to pay for their reasonable value of the services rendered as aforesaid.

WHEREFORE, plaintiff demands judgment against defendants in the amount of $166,250.00, together with interest and cost of suit.

THIRD COUNT

1. The plaintiff repeats the allegations of the First and Second Counts as if set forth at length herein.

2. The plaintiff has rendered certain brokerage services to the defendants.

3. As a result of the services rendered by the plaintiff, the First National State Bank of New Jersey has issued to the defendants a construction and interim loan commitment in the sum of $4,500,000.00.

4. The defendants have willfully and in derogation of their agreement with the plaintiff attempted to place a loan elsewhere by use of the above-mentioned construction and interim loan commitment.

5. The defendants have attempted to accept the benefits of the construction and interim loan commitment derived directly as a result of the plaintiff's brokerage services and have attempted to obtain a loan elsewhere, thereby accepting the benefits of the services rendered by

the plaintiff without accepting the loan commitment and paying for the brokerage services rendered.

6. By reason of their actions, the defendants have been unjustly enriched in that they have succeeded in obtaining a construction and interim loan commitment without paying for the brokerage services rendered by the plaintiff.

WHEREFORE, the plaintiff demands judgment against the defendants jointly and severally in the amount of $166,250.00, together with interest and costs of suit and punitive damages.

FOURTH COUNT

1. The plaintiff repeats the allegations of the First and Second Counts as if set forth at length herein.

2. The defendants have acted with malice, solely for the purpose of causing damage and injury to the plaintiff's business interests and have willfully, without justification and in bad faith interfered with the plaintiff's attempt to place a construction and interim loan commitment.

3. By reason of the defendants' willfull and malicious interference with the plaintiff's business interests as aforesaid, the plaintiff has been damaged in the amount of $166,250.00.

WHEREFORE, the plaintiff demands judgment against the defendants jointly and severally in the amount of $166,250.00 together with interest, cost of suit, punitive damages and such other relief as the court deems just and proper.

LUM, BIUNNO & TOMPKINS
Attorneys for Plaintiff,
Weston Funding Corporation

By: s/Joseph R. McMahon
JOSEPH R. McMAHON

Exhibit "A" attached to Complaint in N.J. Federal District Court

WESTON FUNDING CORPORATION

[illegible] NEW YORK, N.Y. 10020 / TELEPHONE 212 581-8620

FEBRUARY 25, 1974

DR. GEORGE C. PECK
1200 ROUTE 46
CLIFTON, N.J. 07013

RE: LAFAYETTE TOWERS
180 LAFAYETTE AVENUE
PASSAIC, NEW JERSEY
$4,500,000 LOAN COMMITMENT

DEAR DR. PECK:

IT IS UNDERSTOOD THAT A CONSTRUCTION AND INTERIM LOAN COMMITMENT HAS BEEN ISSUED BY THE FIRST NATIONAL STATE BANK OF NEW JERSEY, IN THE SUM OF $4,500,000, FOR THE ABOVE CAPTIONED PROJECT.

CONFIRMING OUR AGREEMENT AND UNDERSTANDING THE AMOUNT OF $191,250 HAS BEEN EARNED AND IS ~~DUE~~ DUE AND PAYABLE 3% TO WESTON FUNDING CORPORATION FOR THEIR BROKERAGE SERVICES IN THIS MATTER, upon closing of Loan ~~[illegible]~~ Eliot 3%

YOUR SIGNATURE BELOW IN BOTH PLACES WILL CONSTITUTE YOUR ACCEPTANCE AS AN INDIVIDUAL, AND, FOR THE CORPORATION.

CORDIALLY,

WESTON FUNDING CORPORATION

E. R. Weston

ELIOT R. WESTON,
PRESIDENT

ACCEPTED AND APPROVED:

Geo. C. Peck

GEORGE C. PECK

Geo. C. Peck

LAFAYETTE TOWERS, INC.

P.S. Enclosed is $25,000.00 on account c/along leaving balance of $166,250.00.

EXHIBIT ATTACHED TO ANSWER TO NEW YORK COMPLAINT

Answer & Counterclaim in New Jersey Federal District Court

ORIGINAL FILED
JUN 12 1974
ANGELO D. LOCASCIO
CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

WESTON FUNDING CORPORATION,	:	
Plaintiff,	:	CIVIL ACTION FILE NO. 74-746
vs.	:	
LAFAYETTE TOWERS, INC., a corporation of the State of New Jersey, and GEORGE C. PECK,	:	ANSWER and COUNTERCLAIM
Defendants.	:	

Defendants, Lafayette Towers, Inc., a corporation of the State of New Jersey, and George C. Peck, having an office at 180 Lafayette Avenue, Passaic, New Jersey, answering the Complaint filed against them say:

FIRST COUNT

1. They neither admit nor deny the allegations contained in paragraph 1 and leave plaintiff to its proof.

2. They admit the allegations contained in paragraph 2.

3. They admit the allegations contained in paragraph 3.

4. They neither admit nor deny the allegations contained in paragraph 4 and leave plaintiff to its proof.

5. They deny the characterizations contained in paragraph 5

insofar as they refer to any written agreements, and instead refer to the entire original instrument in response thereto.

6. They deny the allegations contained in paragraph 6.

7. They admit that demands were made but aver that they were unjustified and, therefore, the refusal to pay was proper.

SECOND COUNT

1. Defendants repeat each and every answer to the First Count as though the same were repeated herein at length verbatim.

2. They deny the allegations contained in paragraph 2.

3. They deny the allegations contained in paragraph 3 except to admit that they paid the sum of $25,000.00, to which defendants are entitled as a refund from what is paid on account of services not completed.

4. They admit that they did not pay plaintiff and aver that any such refusal is justified since plaintiff is not entitled to the sum demanded.

THIRD COUNT

1. Defendants repeat each and every answer to the First and Second Counts as though the same were repeated herein at length verbatim.

2. They neither admit nor deny the allegations contained in paragraph 2 but refer to the entire contractual instrument between the parties.

3. They neither admit nor deny the allegations contained in paragraph 3 but refer to the entire contractual instrument between the parties.

4. They deny that any attempt to place a loan elsewhere as alleged in paragraph 4 was in derogation of any rights of plaintiff.

5. They deny the allegations contained in paragraph 5.

6. They deny the allegations contained in paragraph 6.

FOURTH COUNT

1. Defendants repeat each and every answer to the First, Second and Third Counts as though the same were repeated herein at length verbatim.

2. They deny the allegations contained in paragraph 2.

3. They deny the allegations contained in paragraph 3.

SEPARATE DEFENSES TO FIRST COUNT

1. The complaint should be dismissed by reason of plaintiff's failure to state a cause of action upon which relief may be had. The instrument between the parties provided that any monies to which plaintiff would otherwise be entitled should be earned and become due and payable upon the closing of the loan referred to in the instrument. Said loan never closed by reason of defendants' inability to meet certain contingencies which were not agreed to with plaintiff.

2. Plaintiff is estopped to deny the written express terms of the instrument between the parties, which instrument precludes plaintiff from maintaining this action.

3. The understanding and agreement of the parties was that the monies would be deemed earned only in the event plaintiff was able to deliver an unconditional mortgage commitment or one with conditions that defendants could satisfy. Plaintiff failed to provide such a commitment. Accordingly, the instrument is void for want of consideration on the part of the plaintiff.

4. The claim of plaintiff is premature since no loan has closed with the bank in question, and, accordingly, should be dismissed with costs.

5. The instrument is void and illegal and is contrary to the statutes of the State of New Jersey, including by not limited to N.J.S.A.31:1-1, , as well as the rules and regulations of the State of New Jersey Commissioner of Banking and Insurance, and the complaint should, therefore, be dismissed.

SEPARATE DEFENSES TO SECOND COUNT

1. Defendants repeat and incorporate herein all defenses to the First Count as though the same were repeated at length verbatim.

2. The sum demanded does not reflect the reasonable value of any services allegedly performed on behalf of defendants and,

accordingly, complaint should be dismissed.

SEPARATE DEFENSES TO THIRD COUNT

1. Defendants repeat and incorporate herein all defenses to the First and Second Counts as though the same were repeated at length verbatim.

SEPARATE DEFENSES TO FOURTH COUNT

1. Defendants repeat and incorporate herein all defenses to the First, Second and Third Counts as though the same were repeated at length verbatim.

SEPARATE DEFENSES TO ALL COUNTS

1. The instrument upon which this suit is based was executed by defendants under conditions of economic compulsion and/or duress. Complaint should, therefore, be dismissed.

2. The instrument which is annexed to the complaint and upon which this suit is based was executed by plaintiff upon the understanding that no monies would be due until defendants would be able to fulfill any conditions imposed under the terms of the mortgage commitment. The conditions were not fulfilled by defendants. Therefore, the complaint should be dismissed.

3. Any enforceable agreement between the parties was between plaintiff and Lafayette Towers, Inc. only, and not the individual named defendant. Accordingly, the complaint should be dismissed as to George C. Peck.

4. The instrument which is annexed to the complaint does not reflect a true and complete agreement. The complaint should be dismissed.

5. The instrument annexed to the complaint was signed by defendants by reason of the duress and/or compulsion. Accordingly, the complaint should be dismissed with costs.

6. The transaction as stated by plaintiff in the complaint is illegal and unenforceable and void. The complaint should, therefore, be dismissed.

COUNTERCLAIM

Defendants, Lafayette Towers, Inc., a corporation of the State of New Jersey, and George C. Peck, for their counterclaim against plaintiff say:

FIRST COUNT

1. Prior to February 25, 1974, the plaintiff offered to provide services to defendant Lafayette Towers, Inc., in assisting Lafayette Towers, Inc. to secure a construction mortgage for the premises known as Lafayette Towers in Passaic, New Jersey.

2. The agreement between the parties was that no monies would be due and payable and earned until defendants would meet all conditions of the mortgage commitment and the mortgage loan closed.

3. The agreement further was that the monies which would be paid to plaintiff would be payable out of the proceeds of the

mortgage loan which was to be secured.

4. Prior to the time of closing of the loan, plaintiff advised defendants that unless defendants paid the sum of $25,000.00 on account to plaintiff, defendants would not be able to complete their transaction with the First National State Bank of New Jersey.

5. Said agreement to make a payment on account did in no way modify the conditions and terms of the original instrument, as aforesaid.

6. Plaintiff failed to provide a construction commitment which contained conditions that defendants were able to secure, and, accordingly, no loan closing with the First National State Bank of New Jersey took place.

7. By reason of the foregoing, plaintiff is obliged to return and refund the sum of $25,000.00 to defendants, but despite this and demands by defendants that payment be made, plaintiff has refused, neglected and failed to return the sum of $25,000.00.

WHEREFORE, defendants demand judgment against plaintiff in the sum of $25,000.00, together with interest and costs of suit.

SECOND COUNT

1. Defendants repeat each and every allegation in the First

Count as though the same were repeated herein at length verbatim.

2. Plaintiff, being aware of defendants severe financial and economic situation with respect to the apartment project known as Lafayette Towers, did willfully, maliciously and unconscionably take unfair advantage of defendants in advising defendants that unless the instrument which is annexed to the complaint was executed by defendants, the mortgage loan which had been tentatively secured through the First National State Bank of New Jersey, and the sum of $25,000.00 paid at that time, the mortgage loan would not be completed. Although this was contrary to the agreement and understanding of defendants and plaintiff, defendants had no alternative but to sign the instrument and pay the sums on account under the said conditions of economic compulsion and duress.

3. Said conduct of plaintiff is unconscionable and tantamount to fraud, and constitutes a constructive fraud thereby entitling defendants to the following relief:

A. Judgment of reformation of the instrument of February 25, 1974 to reflect the true agreement between the parties;

B. Punitive damages.

C. Attorneys' fees and costs of this suit.

I hereby certify that the within pleading has been filed and served within the time provided for by the applicable Rules of Court.

s/Richard K. Rosenberg
RICHARD K. ROSENBERG

ROSENBERG & WALDMAN
A Professional Corporation
Attorneys for Defendants

by: s/Richard K. Rosenberg
RICHARD K. ROSENBERG

DEFENDANTS' NOTICE OF MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ~~NEW YORK~~

----------x

WESTON FUNDING CORPORATION,

Plaintiff,

-against-

LAFAYETTE TOWERS, INC., a corporation of the State of New Jersey, and GEORGE C. PECK,

Defendants.

----------x

CIVIL ACTION FILE NO. 75 Civ 1305

JUDGE CARTER

NOTICE OF MOTION

S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavit of MAX ZUCKER, duly sworn to the 17th day of July, 1975, the affidavit of RICHARD K. ROSENBERG, sworn to the 2nd day of July, 1975, and upon the exhibits annexed hereto, and the pleadings on file in this Court, the undersigned attorneys will move this Honorable Court on the 22nd day of August, ~~July~~, 1975, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, at the United States Courthouse located at Foley Square, Borough of Manhattan, City and State of New York, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment in favor of the defendants and dismissing the action of the plaintiff on the ground that there is no genuine issue of facts existing

in the above entitled action and further on the ground of res judicata, and that the defendants are entitled to judgment as a matter of law, and for such other and further relief as the Court may deem necessary.

Dated: New York, New York
July 17, 1975

KANE & ZUCKER

By _____

Attorneys for Defendants
Office & P.O. Address
401 Broadway
New York, New York 10013

TO: ALBERT B. GINS, ESQ.,
Attorney for Plaintiff
Office & P.O. Address
36 West 44th Street
New York, N.Y. 10036

AFFIDAVIT OF MAX ZUCKER IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

----------x

WESTON FUNDING CORPORATION,

Plaintiff,

-against-

LAFAYETTE TOWERS, INC., a corporation of the State of New Jersey, and GEORGE C. PECK,

Defendants.

----------x

CIVIL ACTION FILE
NO. 75 Civ 1305

JUDGE CARTER

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

MAX ZUCKER, being duly sworn, deposes and says:

I am a member of the firm of KANE & ZUCKER, attorneys for the defendants herein.

This motion is for summary judgment based mainly on the theory of res judicata. Annexed hereto are copies of the pleadings in the action brought by the plaintiff against these defendants in the United States District Court for the District of New Jersey, a copy of the notice of motion for summary judgment and a copy of the opinion and order of Judge James A. Coolihan, United States District Judge, before whom said motion was brought.

An appeal was filed by the plaintiff from said order and thereafter a stipulation for dismissal of the appeal was entered into by the attorneys for the respective parties.

It is respectfully submitted that the order of Mr. Justice Coolihan, granting the motion for summary judgment, is now the law of this case.

Sworn to before me, this
17 day of July, 1975

MAX ZUCKER

STANLEY ZUCKER
Notary Public, State of New York
No. 31-9313050
Qualified in New York County
Commission Expires March 30, 1976

AFFIDAVIT OF RICHARD K. ROSENBERG IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK
----------x

WESTON FUNDING CORPORATION,

Plaintiff,

-against-

LAFAYETTE TOWERS, INC., a corporation of the State of New Jersey, and GEORGE C. PECK,

Defendants.

CIVIL ACTION FILE NO. 75 Civ 1305

JUDGE CARTER

AFFIDAVIT

----------x

STATE OF NEW JERSEY)
COUNTY OF BERGEN) SS:

RICHARD K. ROSENBERG, being duly sworn, deposes and says as follows:

I am a member of the firm of ROSENBERG & WALDMAN, attorneys located in Glen Rock, New Jersey.

We were the attorneys for the defendants in an action entitled as follows:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 74-746
----------x
WESTON FUNDING CORPORATION,

Plaintiff,

v.

LAFAYETTE TOWERS, INC., a corporation of the State of New Jersey and GEORGE C. PECK,

Defendants.

----------x

In that action, we interposed an answer to the complaint and subsequently we made a motion for summary judgment which was granted. Annexed to the answer in the action herein are copies of the complaint and answer interposed by the defendants in the District Court of New Jersey (supra), as well as the Opinion and Order of the Honorable James A. Coolahan, United States District Judge.

I have compared the foregoing, complaint, answer, Opinion and Order with the originals and I find them to be true and complete copies thereof.

A Notice of Appeal was filed by the plaintiff from the order of Judge Coolahan, a photo copy of which is annexed hereto.

Thereafter a stipulation was entered into between the attorneys for the plaintiff and Rosenberg & Waldman as attorneys for the defendants, dismissing said appeal, etc. A photo copy of such stipulation for dismissal of appeal is annexed hereto. The foregoing are true copies of the originals referred to herein.

Sworn to before me, this
2nd day of July, 1975

ANTOINETTE M. SALMINEN
Antoinette M. Salminen
Notary Public of New Jersey
My commission expires May 2, 1977.

RICHARD K. ROSENBERG
RICHARD K. ROSENBERG

EXHIBITS ATTACHED TO MOTION PAPERS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN NEW YORK FEDERAL DISTRICT COURT

(Heretofore reproduced as indicated)

Complaint in New Jersey Federal District Court

(Heretofore reproduced at pages 41a to 44a)

Exhibit "A" attached to foregoing Complaint in New Jersey Federal District Court

(Heretofore reproduced at page 45a)

Answer & Counterclaim in New Jersey Federal District Court

(Heretofore reproduced at pages 46a to 53a)

EXHIBIT ATTACHED TO MOTION PAPERS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN NEW YORK FEDERAL DISTRICT COURT

Notice of Motion for Summary Judgment in New Jersey Federal District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

#1031B

WESTON FUNDING CORPORATION, Plaintiff vs. LAFAYETTE TOWERS, INC., a corporation of the State of New Jersey, and GEORGE C. PECK Defendants	CASE NO. 74-746 Civil Action NOTICE OF MOTION FOR SUMMARY JUDGMENT

Original filed
SEP 21 1974
ANGELO W. LOCASCIO, CLERK

TO: LUM, BIUNNO & TOMPKINS, ESQ.
Attorneys for Plaintiff
550 Broad Street
Newark, New Jersey 07102

PLEASE TAKE NOTICE that the undersigned attorneys for the defendants shall move before the Honorable James A. Collahan, Judge of the United States District Court, Federal Court House, U. S. Post Office Building, Newark, New Jersey on Tuesday, October 15, 1974 at 10:00 A.M. in the forenoon or as soon thereafter as counsel may be heard for a Summary Judgment pursuant to Rule 56b as to the complaint on the grounds that there is no genuine issue as to any material fact and that

defendants are entitled to summary judgment as a matter of law.

PLEASE TAKE FURTHER NOTICE that in support of this application, we shall rely on the brief simultaneously filed herewith.

ROSENBERG & WALDMAN
Attorneys for Defendants

By s/Richard K. Rosenberg
Richard K. Rosenberg
139 Harristown Road
Glen Rock, N. J. 07452
(201) 447-5400

I hereby certify that the within pleading has been filed and served within the time provided for by the applicable Rules of Court.

s/Richard K. Rosenberg

BEST COPY AVAILABLE

EXHIBIT ATTACHED TO MOTION PAPERS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN NEW YORK FEDERAL DISTRICT COURT

Opinion and Order in New Jersey Federal District Court

[New Jersey Title]

Appearances:

Messrs. Lum, Biunno & Tompkins
By: Dennis J. Drasco, Esq.
For the plaintiff

Messrs. Rosenberg & Waldman
By: Richard K. Rosenberg, Esq.
For the defendants

COOLAHAN, District Judge

This is an action for a brokerage commission by plaintiff Weston Funding Corp., a New York concern, against defendants Lafayette Towers, Inc., a New Jersey corporation, and George C. Peck, Lafayette's sole shareholder and a New Jersey resident. The alleged agreement between the parties was signed in New Jersey, and the real estate used to secure the loan which Weston allegedly agreed to procure was located in New Jersey. Defendants have moved for summary judgment based on the undisputed fact that plaintiff is not licensed as a broker in that State. Plaintiff argues, however, that an issue of material fact exists as to whether the services to be rendered on behalf of Lafayette were those of a broker or a "finder."

Section 2 of the New Jersey Real Estate Brokers' Licensing Act, N.J.S.A. 45:15-1, et seq. (1963), provides:

> No person, firm, partnership, association or corporation shall bring or maintain any action in the courts

> of this state for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and providing that he was a duly licensed real estate broker at the time the alleged cause of action arose. [N.J.S.A. 45:15-3]

That section defines a real estate broker as, inter alia,

> ...a person, firm or corporation who, for a fee, commission...lists for sale, sells, exchanges, buys, rents or offers or attempts to negotiate a sale, exchange, purchase...of real estate... or offers or attempts or agrees to negotiate a loan secured or to be secured by mortgage....

The New Jersey Supreme Court authoritatively construed the phrase "to negotiate a loan secured or to be secured by mortgage" in Corson v. Keane, 4 N.J. 221, 72 A.2d 314 (1950). In Corson, the plaintiff, a professional engineer who had never been licensed as a broker, sued to recover a commission on an alleged contract to find a lender willing to provide additional construction financing to be secured by a mortgage on real estate. Plaintiff testified at trial that his services consisted solely of contacting the lender and arranging a meeting (which he did not attend) between the defendant and the lender. 4 N.J. at 224, 72 A.2d at 315. After judgment was entered for plaintiff, defendant appealed, urging that the trial court erred in denying his motion to dismiss on the ground that the alleged contract was void under the Real Estate Brokers' Licensing Act. On appeal, plaintiff contended that his activities were not within the statute because he "did not negotiate, he merely put the defendant in a position where he might negotiate." 4 N.J. at 224,

72 A.2d at 315. The Supreme Court, however, unanimously rejected this argument. It held that

> [t]he application of the broad language of our statute results in the conclusion that the alleged agreement upon which the plaintiff's suit is predicated is within the prohibition of R.S. 45:15-1, et seq.
>
> Accepting the evidence as true in support of the agreement alleged by the plaintiff to have been made between himself and the defendants and its performance, the construction of the pertinent statute in relation thereto presented a question of law which should have been decided by the trial court and it was error to submit the question to the jury. [4 N.J. at 227, 72 A.2d at 317]

The Court rested its holding on two bases. First, it found persuasive a New York case, Baird v. Krancer, 138 Misc. 360, 246 N.Y.S. 85 (Sup. Ct. 1930),[1] which construed New York's real estate brokers' licensing act[2] broadly to cover agreements to find, as well as agreements to negotiate, a real estate transaction. 4 N.J. at 226-27, 72 A.2d at 316. Second, it found that a series of amendments broadening the statutory definition of "real estate broker" indicated a clear legislative intent "to close avenues to the unlicensed participation in the business of real estate brokerage." 4 N.J. at 227, 72 A.2d at 317.

Although the holding in Corson appears dispositive of the question whether summary judgment must be denied if there

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[1] Baird was later followed in Pennsylvania. See Alford v. Raschiatore, 163 Pa. Super. 635, 63 A.2d 366 (Super. Ct. 1949).

[2] N.Y. Real Prop. Law § 440 (McKinney 1945).

exists a factual dispute as to whether the agreement under which recovery is sought was a "finder's" agreement, plaintiff argues that Corson is no longer an accurate statement of New Jersey law. He reaches this conclusion because "the majority rule and particularly the law of New York and Pennsylvania clearly uphold the distinction between a 'finder' and a 'broker' and hold that 'a question of fact' is presented as to the extent of negotiations taken on by the plaintiff...before defeating the right of compensation under a licensing statute."

Even if this Court were to accept as accurate plaintiff's first premise that the rule of the Baird case, in which the Corson Court in part relied, has been abandoned in New York and in Pennsylvania,[3] it could not accept his conclusion that Corson

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[3] Insofar as plaintiff's argument speaks to the "majority rule" and to the New York rule governing transactions not involving real property, it is irrelevant; the Court in Corson did not rest its holding on any case except the Baird case.

Insofar as the argument asserts that Baird is no longer good law in New York, moreover, research suggests that it is inaccurate. The case was followed in 1966, see Sorice v. Du Bois, 267 N.Y.S.2d 227 (App. Div. 1966), and I have not discovered any case overruling it. New York cases cited by plaintiff recognizing a distinction between finding agreements and brokers' agreements did not arise under the real estate broker's licensing statute construed in Baird; rather, they involved personal property transactions under a different statute. See Wells v. Dent, 164 N.Y.S. 2d 646 (App. Div. 1957) (New York Personal Property Law § 31 subdivision 10); Kuffler v. List, 144 F.Supp. 776 (S.D.N.Y. 1936) (N.Y. Personal Property Law § 31 subdivision 10).

Finally, plaintiff's assertion that Pennsylvania law "clearly upholds" a distinction between finder's agreements and broker's agreements, even assuming it has some relevance to this case, is certainly erroneous. Compare Snyder Realty Co. v. Sherill Noonan, Inc., 261 F.2d 269 (3d Cir. 1958) with Alford v. Raschiatore, 163 Pa. Super. 635, 63 A.2d 366 (Super. Ct. 1949).

is no longer binding precedent on New Jersey courts. The holding in that case is not a rule of law riddled with numerous exceptions engrafted by New Jersey courts. Cf. Mason v. American Emery Wheel Works, 241 F.2d 906 (1st Cir. 1957). Rather, it is an authoritative construction of a State statute based upon a rationale of public policy which has been reinforced by the Legislature[4] and continuously reaffirmed by New Jersey courts.[5]

Federal courts sitting in diversity cases are bound to follow State decisions authoritatively construing a State statute. See 1A Moore's Federal Practice ¶ 0.302[3] (1974). This Court, therefore, is obliged to follow Corson v. Keane, and consequently summary judgment will not be denied solely because plaintiff alleges that his agreement was merely a "finder's" agreement.

This case is squarely controlled by Corson but for the presence of two potentially relevant facts: (1) the alleged agreement here involves certain New York contacts; and (2) unlike the plaintiff in Corson, plaintiff Weston is licensed as a broker in New York and Mr. Weston, its president, is a member of the Florida bar. Weston has proffered additional arguments in opposition to summary judgment based on these two circumstances.

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[4] The Real Estate Brokers' Licensing Act was again amended subsequent to Corson to broaden the definition of "real estate broker" and "real estate salesman." See L. 1953, c. 229, p. 1687, § 2.

[5] See, e.g., Tannenbaum v. Sylvan Builders, Inc., 50 N.J. Super. 342, 142 A.2d 247 (App. Div. 1958); Boise Cascade Home & Land Corp. v. Div. of N.J. Real Estate Comm., 121 N.J. Super. 228, 296 A.2d 545 (Ch. Div. 1972).

First, it urges that since defendant initially contacted plaintiff to solicit its services in New York, and since the contract was signed in New Jersey due only to a fortuity, the New Jersey licensing act cannot bar enforcement of the agreement. This argument is without merit. "Whenever a significant part or material 'incident' of a transaction involving an unlicensed broker takes place in New Jersey, the statute applies." Tanenbaum v. Sylvan Builders, Inc., 50 N.J.Super. 342, 358, 142 A.2d 247, 256 (App. Div. 1958). Accord, Stahl v. Twp. of Teaneck, 162 F.Supp. 661, 668 (D.N.J. 1958).

Second, plaintiff argues that the policy underneath the New Jersey statute cannot be offended in this case because it involves a suit by a party who is licensed as a real estate broker in New York and registered as a member of the bar in Florida. Stahl v. Twp. of Teaneck, supra, held, however, on the basis of the strong public policy embodied in the act, that the statute applied to a plaintiff who was unlicensed as a broker in New Jersey, even though he was licensed in that capacity in New York. Id. at 667. Unless that holding be rejected, a different result cannot obtain merely because the plaintiff is an attorney in another State as well.

If the policy behind the act is strong enough to apply when a plaintiff holds a foreign State's broker's license, which New Jersey would accept as proof of his competence to act as a broker, see N.J.S.A. 45:15-20 (1963), then this Court cannot conclude that the force of that policy is spent at the moment

that he obtains a foreign State's license to practice law, which New Jersey has not seen fit to consider at all when it issues a broker's license. See N.J.S.A. 45:15-4 (1963). Thus, since the plaintiff has not challenged the validity of the holding in Stahl, I conclude that its final objection to summary judgment must be rejected.

Having found that the New Jersey Real Estate Brokers' Licensing Act applies to both finder's and broker's agreements, to real estate transactions with any significant New Jersey incidents, and to a plaintiff licensed as a broker and an attorney in other States, this Court concludes that no issue of material fact exists in this case.[6]

Accordingly, it is on this 6th day of November, 1974 ORDERED that summary judgment shall be entered in favor of defendants.

S/ James A. Coolahan
JAMES A. COOLAHAN
United States District Judge

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[6] In light of these conclusions, the Court need not determine whether the affidavits and depositions submitted in this case present a question of fact as to whether plaintiff actually "negotiated" the loan in question.

EXHIBIT ATTACHED TO MOTION PAPERS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN NEW YORK FEDERAL DISTRICT COURT

Notice of Appeal in New Jersey Federal District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 74-746

WESTON FUNDING CORPORATION, Plaintiff, v. LAFAYETTE TOWERS, INC., a corporation of the State of New Jersey and GEORGE C. PECK, Defendants.	NOTICE OF APPEAL

Notice is hereby given that the plaintiff, Weston Funding Corporation, plaintiff, above-named, hereby appeals to the United States Court of Appeals for the Third Circuit from the order of the Honorable James A. Coolahan, United States District Judge, granting summary judgment in favor of the defendants entered on the 11th day of November, 1974.

LUM, BIUNNO & TOMPKINS
Attorneys for Plaintiff-Appellant, Weston Funding Corp.

By: S/Dennis J. Drasco
DENNIS J. DRASCO

DATED: DECEMBER 10, 1974

Original Filed
Dec. 10, 1974
Angelo W. Locascio, Clerk

EXHIBIT ATTACHED TO MOTION PAPERS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN NEW YORK FEDERAL DISTRICT COURT

Stipulation for Dismissal of Appeal in New Jersey Federal District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 74-746

WESTON FUNDING CORPORATION Plaintiff, v. LAFAYETTE TOWERS, INC., a corporation of the State of New Jersey and GEORGE C. PECK, Defendants.	STIPULATION FOR DISMISSAL OF APPEAL

It is hereby stipulated by and between attorneys for the respective parties hereto, that the Appeal taken by plaintiff from the Summary Judgment granted in favor of the defendants entered on the 11th day of November, 1974, by Notice of Appeal filed December 10, 1974, the said Appeal not having been docketed in the Court of Appeals for the Third Circuit, be and the same hereby is dismissed, subject to the approval of the above Court, without costs in favor of either party as against the other.

LUM, BIUNNO & TOMPKINS
Attorneys for Plaintiff-
Appellant, Weston Funding Corp.

BY _____
DENNIS J. DRASCO

DATED: MARCH 18, 1975

ROSENBERG & WALDMAN
Attorneys for Defendants
Lafayette Towers, Inc., and
George C. Peck.

BY _____
RICHARD ROSENBERG

DATED:

AFFIDAVIT OF ELIOT R. WESTON IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK
----------x

WESTON FUNDING CORPORATION,

Plaintiff,

-against-

LAFAYETTE TOWERS, INC., a corporation of the State of New Jersey, and GEORGE C. PECK,

Defendants.

----------x

CIVIL ACTION FILE
NO. 75 Civ 1305

JUDGE CARTER

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK, COUNTY OF NEW YORK, ss.:

ELIOT R. WESTON, being duly sworn, deposes and says:

I am the president of WESTON FUNDING CORPORATION, the plaintiff in the above-entitled action, which corporation is licensed to do business in the State of New York.

I make this affidavit in opposition to the defendants' Motion for Summary Judgment.

The initial conversations in this matter between myself and defendant GEORGE C. PECK took place on or about October 2, 1973. These conversations tock place either at my offices at 1 Rockefeller Plaza in New York City, or on the telephone from or to my said offices in New York City. The

defendant Peck came to my office after the above date. I never met with him in New Jersey, except for the [illegible] occasion to which I will refer later in this affidavit.

The original retainer agreement between the plaintiff corporation and the defendants was drawn by me in New York City on my New York stationery and signed by me and the defendants at my offices in New York City on November 1, 1973. A copy of same is attached as Exhibit A.

Said retainer agreement providing for our exclusive services expired seven (7) days after the date thereof, and was extended orally by the defendants, who urged me to continue to try to obtain a standby commitment for an end loan of $4,500,000.00, as set forth in said Exhibit A.

After trying to obtain a standby and end loan from our contacts in Indiana, Illinois, New York, Massachusetts, Connecticut, Pennsylvania, Ohio and New Jersey, we finally were successful in obtaining a written commitment from the First National State Bank of New Jersey, a copy of which is attached as Exhibit B.

We immediately advised the defendants of same and the defendant Peck expressed himself as extremely pleased and gratified. We then prepared a letter which merely reduced to figures the original

agreement between us and had a copy delivered to the defendant Peck. We spoke to him by telephone and he agreed with the terms thereof.

We then requested the defendant to come to the New York offices to sign the same, which was on our stationery, prepared in the New York offices by me and my secretary. I signed it in New York, after speaking to the defendant Peck several times and,as I said before, obtaining his consent to the figures therein set forth.

At first the defendant Peck agreed to come to New York City and sign the same in our offices but, after consulting with his New Jersey attorney, he requested, on the pretence of pressing business, that I meet with him at the Howard Johnson Restaurant on Route 3 in New Jersey, where he would sign the letter agreement. Please note that,on his request I met him in New Jersey, which was after he consulted with his New Jersey attorney and probably at the attorney's suggestion.

Naturally I was anxious,on behalf of my company, to obtain the defendants' signatures to the hard and fast figures which we had agreed upon over the telephone, both as to the commitment and to our commission and, therefore. without realizing that this might be a clever trap to entice me to meet in New Jersey, I obliged the defendants and met defendant Peck at Howard Johnsons Restaurant.

When we met, he had already made changes in his copy and proceeded to make changes on the original, which I presented to him. I was anxious to commit him and his company and, therefore, had no alternative but to accept Exhibit A as altered by him. He then produced a check already prepared and signed by him in the sum of $25,000.00 and when I objected to the amount, he claimed that he was unable at that time to raise any additional funds but assured me that the balance would be paid.

Even as late as April 24, 1974, the First National State Bank of New Jersey indicated that it was ready to close the loan transaction and so stated in a letter dated April 24, 1974 (Exhibit D) from Robert B. Greenbaum the attorney for the bank to Richard K. Rosenberg, the attorney for the defendants.

I subsequently ascertained that the defendants used the commitments in Exhibits C and D as a springboard to obtain, behind the plaintiff's back and without its knowledge, a loan from different sources (see Exhibits E and F attached hereto), whereas prior to February 25, 1974, the defendants had not been able to raise any money whatsoever and were, indeed, threatened with foreclosure by the institution which had previously given them the construction loan.

Affidavit of Eliot R. Weston in Opposition to Defendants' Motion for Summary Judgment

I state categorically that every transaction between me and the defendants took place either in New York City, or on the telephone, to or from my New York offices, and that the only time I met with the defendants or either of them in New Jersey, was in connection with the letters dated February 25, 1974 (Exhibits B and C).

I am advised, and believe, that I have a good and meritorious cause of action and that there are substantial questions of fact to be determined on the trial of this action and that Judge Coolahan's decision in the New Jersey Federal District Court was based primarily and almost entirely on the ground that this plaintiff was not licensed to do business in New Jersey. Hence, every other portion of Judge Coolahan's opinion was not necessary to his decision and therefore could not be considered to be on the merits. Thus, the dismissal of the New Jersey action on the very technical ground that plaintiff was not licensed to do business in New Jersey, cannot be considered res adjudicata of the issues in the present case. I therefore respectfully request that this Court deny the defendants' motion for summary judgment

/s/ Eliot R. Weston

Eliot Weston

Sworn to before me this 24th
day of September, 1975

ALDEN B. GINS
Notary Public, State of New York
No. 31-4535530
Qualified in New York County
Term Expires March 30, 19

AFFIRMATION OF ALBERT B. GINS IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK
----------x

WESTON FUNDING CORPORATION,

Plaintiff,

-against-

LAFAYETTE TOWERS, INC., a corporation of the State of New Jersey, and GEORGE C. PECK,

Defendants.

CIVIL ACTION FILE
NO. 75 Civ 1305

JUDGE CARTER

AFFIRMATION IN OPPOSITION

----------x

STATE OF NEW YORK, COUNT OF NEW YORK, ss.:

ALBERT B. GINS, an attorney admitted to practice before the Courts of New York, under the penalties of perjury, affirms as follows:

I am the attorney for the plaintiff in the above entitled action, and am fully familiar with all the prior pleadings and proceedings herein. I make this affirmation in opposition to the the defendants' motion for summary judgment.

I have examined the moving papers and call the attention of this Court to the fact that the New Jersey action was brought by the plaintiff solely on the letter of February 25, 1975, whereas the instant action is based on the initial agreement of November 1, 1973 (Exhibit A.)

As set forth in the Complaint, Exhibit A was extended by the defendants and Exhibit B was merely the reduction to concrete figures of the moneys due from the defendants to the plaintiff, including the conditions under which the same was to be paid.

Thus, Exhibit B was not the agreement which authorized the plaintiff to seek the standby and end loan for the defendants but it was Exhibit A which authorized the plaintiff to do so.

Therefore, the New Jersey action although between the same parties is not predicated on the same agreement. The issues are different, the law is different, and the New Jersey opinion is without relevance to the instant case.

Comparison of the Complaint in the New Jersey action with the New York action shows these differences clearly. Some of them are:

1. Did the defendants authorize the plaintiff to seek the standby and end loan?

2. Did the defendants extend that authorization?

3. Did the plaintiff obtain a commitment for a standby and end loan?

4. Was the standby and end loan approved by a lending institution?

Affirmation of Albert B. Gins in Opposition to
Defendants' Motion for Summary Judgment

5. Did the defendants approve and accept the conditions of the lending institution's commitment?

6. Was the payment of $25,000.00 by the defendant Peck such an approval of the said commitment?

7. Is the plaintiff entitled to the balance of $166,250.00, as set forth in Exhibit B?

8. Did the defendants use the commitment set forth in Exhibit C to obtain a loan from another lending institution or institutions?

9. Did the defendants do so with malice and with the purpose of defrauding the plaintiff?

10. Was the transaction between plaintiff and defendants a New York or a New Jersey transaction?

None of these issues were decided in the New Jersey action. The only issue decided by Judge Coolahan was that the plaintiff was not licensed to do business in New Jersey and hence could not maintain that or any other action in New Jersey. Everything else in Judge Coolahan's decision is obiter dictum and not pertinent to his decision.

Judge Coolahan's opinion and decision is therefore not res adjudicata of the issues in the instant case.

Although plaintiff in the New Jersey case served a notice of appeal from Judge Coolahan's decision, it was withdrawn and the appeal discontinued before any record or briefs were served or any hearing heard on the appeal. There is, therefore, no appeal pending at the present time.

The defendants' motion should therefore be denied with costs and attorney's fees.

Dated: New York, New York
September 24, 1975



Albert B. Gins

EXHIBITS ATTACHED TO AFFIDAVIT OF ELIOT R. WESTON IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Exhibit "A"

Letter dated November 1, 1973 from Eliot R. Weston to Dr. George Peck

(Heretofore reproduced at page 32a)

Exhibit "B"

Letter dated February 25, 1974 from Eliot R. Weston to Dr. George C. Peck

(Heretofore reproduced at page 45a)

EXHIBIT "C" ATTACHED TO AFFIDAVIT OF ELIOT R. WESTON IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Commitment Letter from First National State Bank of New Jersey to Lafayette Towers

ESTABLISHED 1812

First National State Bank
OF NEW JERSEY

EXECUTIVE OFFICE
550 Broad Street • Newark, New Jersey 07102

(201) 565-3200

February 25, 1974

BEST COPY AVAILABLE

Lafayette Towers
180 Lafayette Avenue
Passaic, New Jersey 07055

Re: 120 unit Condominium Apartment Building
180 Lafayette Avenue
Passaic, New Jersey

Gentlemen:

Your application for mortgage financing on the captioned project has been approved by First National State Bank of New Jersey (Bank) in accordance with its by-laws, subject to all of the following:

BORROWER: Lafayette Towers, a partnership consisting of George Peck, M. D. and Angelo Cigolini, or such other entity as may be approved by the Bank (Borrower).

AMOUNT OF LOAN: FOUR MILLION FIVE HUNDRED THOUSAND ($4,500,000.00) DOLLARS, hereafter referred to as the "Principal Amount". Disbursement during the progress of construction shall be limited to a maximum of Four Million ($4,000,000.00) Dollars, hereafter referred to as the "Floor Amount", or ninety (90%) per cent of the value of in place construction as determined by the Bank. Disbursement of the loan up to the Principal Amount may be advanced when (1) at least sixty (60) units have been sold, as defined herein; and (2) the aggregate sales volume of sold units is not less than Three Million Five Hundred Thousand ($3,500,000.00) Dollars; and (3) construction has been completed in accordance with the Plans and

Specifications to the satisfaction of the Bank and conditions for closing in the permanent loan commitments have been satisfied.

A unit shall be deemed sold when a bona fide contract of sale has been executed and delivered between the parties with a cash deposit thereon paid of not less than ten (10%) per cent of the purchase price and such contract is free of any mortgage contingency through waiver or achievement thereof.

INTEREST RATE, TERM AND REPAYMENT:

Interest shall be payable at the rate of four and one-half (4-1/2%) per cent per annum floating, over the prime interest rate of the Bank which Bank charges from time to time to its most creditworthy customers. Such interest shall be payable monthly on the unpaid balance and the rate shall be adjusted to conform to the foregoing forthwith upon the effective change in the Bank prime rate from time to time. The entire principal balance together with accrued interest, if not sooner paid, will be due and payable in the absence of an earlier default one (1) year from the date of initial closing.

Borrower will pay to Bank a per unit release consideration at the time of closing of each individual permanent loan on a sold unit, such release price to be an amount equivalent to ninety (90%) per cent of the total selling price of the unit conveyed.

MORTGAGED PREMISES:

(a) Location - N/E/S Lafayette Avenue, Passaic, New Jersey, approximately 285 feet southeasterly from Passaic Avenue with a frontage of 373 feet on Lafayette Avenue.

(b) Plot Size - 1.56 acres (approximately).

(c) Description of Improvements - A twelve-story 120 unit apartment building of brick and con-

crete construction, having a total floor area of 160,800 square feet, with parking for one hundred eighty (180) cars (garage and outdoors on site), and with recreation facilities including swimming pool and sauna, all according to plans and specifications heretofore submitted to the Bank, made by James Virgona, A.I.A., 272 State Highway No. 5, Fort Lee, New Jersey, dated , consisting of pages of plans and pages of specifications and initialed by the Borrower, guarantors, the permanent lender and the Bank (Plans and Specifications).

SECURITY: The loan is to be secured by:

(a) A valid first mortgage lien on the mortgaged premises above described; and

(b) A perfected lien under applicable law on personalty and fixtures located in or about the mortgaged premises; and

(c) A conditional guaranty of payment and completion of construction shall be executed by George Peck, M. D. and Angelo Cigolini and their respective spouses; and

(d) A surety payment and performance bond shall be provided by Premium Construction Corp. with surety approved by the Bank, said bond to be in the amount of the contract sum stipulated in the general contract between Borrower and the said general contractor.

PERMANENT FINANCING: A lender approved by the Bank shall issue a satisfactory commitment for the end loans to finance the individual condominium unit purchases. Satisfactory evidence shall be furnished to the Bank that all conditions to which the permanent financing is subject shall have been satisfied.

NONREFUNDABLE COMMITMENT FEE:

Bank is to receive a commitment fee of Forty Five Thousand ($45,000.00) Dollars (nonrefundable), of which Twenty Two Thousand Five Hundred ($22,500.00) Dollars shall be due and payable to this Bank with Borrower's acceptance of this commitment. The said sum of Twenty Two Thousand Five Hundred ($22,500.00) Dollars shall be retained by the Bank as liquidated damages in the event (a) there is a material change in Borrower's or Guarantors' financial condition prior to closing from that financial condition shown on statements heretofore submitted to Bank; or (b) Borrower shall fail to furnish and/or fail to execute all documentation contemplated herein in such form and substance as shall be satisfactory to Bank's counsel. The balance of the commitment fee (Twenty Two Thousand Five Hundred ($22,500.00) Dollars) shall become due and payable at the time of initial closing of the loan. Borrower acknowledges that Twenty Two Thousand Five Hundred ($22,500.00) Dollars as liquidated damages aforesaid would be reasonable compensation to Bank for expenses, work and services more particularly described in the General Conditions annexed hereto

SPECIAL CONDITIONS:

1. Bank is to receive an M.A.I. appraisal of the mortgaged premises showing a projected value of aggregate condominium sales in an amount not less than Seven Million Eight Hundred Thousand ($7,800,000.00) Dollars. The appraisal fee shall be paid by the Borrower.

2. A three party agreement shall be executed by the Bank, Borrower and permanent lender which commits for the permanent financing.

3. There shall be no outstanding judgments against the Borrower or any of the Guarantors.

4. All subcontracts in excess of Twenty Five Thousand ($25,000.00) Dollars are to be submitted to the Bank for approval.

5. Monthly inspections of construction shall be made by an inspector designated by the Bank at a cost to Borrower of Seventy Five ($75.00) Dollars per inspection.

6. Disbursement of loan proceeds shall be made through an account in the name of Borrower opened at the Bank.

7. All deposits received on sales of condominium units shall be deposited in a segregated account at the Bank and retained in escrow, but such funds shall be usable by the Borrower for payment of labor and materials in implementation of the Plans and Specifications following the initial advance by the Bank, but such funds shall not be used to repay any indebtedness with respect to, or any portion of, the land upon which the construction is intended to be built.

8. George Peck, M. D. and is spouse shall deliver to the Bank a mortgage instrument as collateral security for the loan encumbering all of the said Guarantors' right, title and interest, as noted, in and to the following properties which shall not be sold or further encumbered without the prior approval of the Bank:

(a) Clifton Executive Plaza I - 100%
(b) Clifton Executive Plaza II - 50%
(c) Clifton Executive Plaza III - 50%
(d) Clifton Racquet Club - 100%

9. The Plans and Specifications shall be approved by the Bank.

10. Borrower shall furnish Bank with an opinion of counsel satisfactory to Bank that Borrower's marketing plan in the absence of S.E.C. registration does not constitute a violation of applicable S.E.C. rules or regulations as an offering of securities.

11. Borrower warrants and represents its intention to offer condominium units for sale at the prices shown in the annexed purchase price schedule. Borrower shall not offer any unit shown on the schedule for sale at a price below ten (10%) per cent under the price shown on the schedule for such unit.

12. The master deed for the creation of condominium ownership in the mortgaged premises shall be submitted to Bank's attorneys for approval prior to recording.

13. Borrower shall submit to the Bank satisfactory evidence of the availability of water and sanitary sewers to service the completed condominium project.

14. Borrower will not rent or lease any unit or other portion of the improvements or the mortgaged premises without the prior written approval of the Bank.

15. At Bank's request, Borrower will submit the mortgaged premises together with all of the improvements constructed or to be constructed thereon to the provisions of The Condominium Act, R. S. 46:8B-1 et seq. and will satisfy the requirements of applicable law to create a valid residential condominium project.

16. The form of purchase contracts for condominium units shall be approved by the Bank and shall provide, among other things, that the deposit paid thereunder shall be subordinate to the Bank's construction mortgage lien.

17. This loan is to be closed by Bank's counsel, Greenbaum, Greenbaum, Rowe & Smith, 60 Park Place, Newark, New Jersey 07102, on loan documents prepared by such counsel and in accordance with our requirements and procedures. Documentation shall include, but

not be limited to, and in form and substance satisfactory to us, a promissory note, mortgage on the mortgaged premises, building loan agreement (including security agreement to perfect a lien on personalty and fixtures), UCC-1 financing statement, and other items necessary in the opinion of counsel to properly and adequately validate the evidence of the debt to the Bank and the Bank's lien on the property and improvements to be constructed.

18. The general contract between Borrower and Premium Construction Corp. shall be in form and substance approved by the Bank.

On receipt of this commitment, you and/or your attorney should contact Mrs. Wendolyn L. London of our Mortgage Department, 500 Broad Street, Newark, New Jersey 07102, concerning mortgage loan closing procedures.

This commitment and the financing shall be subject to the General Conditions hereto annexed as Schedule "A", and will become effective in accordance with its terms only upon receipt by us, within ten (10) days, of the enclosed copy hereof accepted by the Borrower at the place indicated for such endorsement, together with your check in the amount of Twenty Two Thousand Five Hundred ($22,500.00) Dollars representing one-half of the nonrefundable commitment fee of Forty Five Thousand ($45,000.00) Dollars. Until the receipt of such counterpart and commitment fee by the Bank within the time provided, the Bank shall have no obligation hereunder.

Very truly yours,

FIRST NATIONAL STATE BANK OF NEW JERSEY

By: _____

Edward L. Heil, Senior Vice President

ACCEPTED:

Borrower - Lafayette Towers

By: _____

Date: _____

SCHEDULE "A"

ATTACHED TO AND MADE A PART OF
COMMITMENT LETTER DATED FEBRUARY
25, 1974, TO: LAFAYETTE TOWERS

GENERAL CONDITIONS

1. All obligations on the part of the Bank in connection with this transaction and all matters with respect to title, covenants, restrictions, zoning ordinances, easements or other agreements affecting the mortgaged premises, as well as with respect to the survey, validity and priority of the mortgage lien and the form and substance of all documents necessary to effect the consummation thereof are to be subject to the approval of the Bank's attorneys.

2. Advances during construction shall be made pursuant to the provisions of a building loan agreement which shall provide in part that such advances shall be made in such proportion of the total cost of that portion of the work acceptably completed as determined by the Bank, so that at all times the undisbursed portion of the loan shall be sufficient in the sole judgment of the Bank to complete the contemplated construction.

3. No revisions of the approved Plans and Specifications may be made without the prior written approval of the Bank and the permanent investor, if any.

4. There shall be no secondary financing encumbering the mortgaged premises nor shall there be any encumbrances or security interest conveyed in any fixture or fixtures, nor in any personalty intended to be incorporated in the project whether affixed to the realty or otherwise. The loan papers provide that in the event of a violation of this covenant, the Bank may at its option declare the unpaid principal amount with accrued interest to be immediately due and payable.

5. The necessity for, and the form and substance of each and every document evidencing the loan and the security therefor,

or incident thereto, and any proceedings incident thereto, the title and evidence thereof, and all questions relating to the validity and priority of the security for the loan, shall be determined by and must be satisfactory to the Bank's attorneys.

6. Your acceptance of this commitment shall constitute your unconditional agreement to pay all fees, expenses and charges in respect to the mortgage loan, or in any way connected therewith, including without limiting the generality thereof, title insurance and survey costs, recording and filing fees, the fees and expenses of the Bank's attorneys, and any other taxes, fees and expenses payable in connection with this transaction. The Bank shall not be required to pay any premium or other charge, or any brokerage fee or commission or similar compensation in connection with this commitment or the construction mortgage, and by your acceptance of this commitment you agree to defend, indemnify and hold the Bank harmless against and from any and all claims for any of such matters. Guarantors, if any, shall also be jointly and severally liable with Borrower for this indemnity.

7. During the term of the mortgage loan you are to provide the Bank with annual financial statements of the mortgagor and the guarantors, if any, in form satisfactory to the Bank, listing all assets and liabilities as well as all items of income and expense.

8. You will procure at your own expense and submit to the Bank prior to the first advance, or as appropriate in the opinion of Bank's attorneys:

   (a) An agreement by your architect authorizing the Bank, in the event of default on the mortgage, to use the plans and specifications without liability of the Bank to the architect; and

   (b) An agreement by your architect to continue supervision services, if any, until completion of construction without cost to the Bank, except for services and expenses directly authorized by the Bank; and

   (c) An agreement by your general contractor that in the event of your default under any of the loan documents, the contractor will continue performance on Bank's behalf under

the general contract in accordance with the terms thereof, provided that the contractor shall be reimbursed in accordance with said agreement for work, labor and materials rendered on Bank's behalf; and

(d) Within fifteen (15) days of the acceptance hereof, a projected construction progress schedule in form required by the Bank; and

(e) A certification by your architect that the project as shown on the approved Plans and Specifications is in compliance with all applicable governmental requirements; and that work, labor and materials incorporated in the project to the date of such certification is in substantial compliance with the approved Plans and Specifications. With respect to subsequent advances, the said architect shall certify as to the in place value of construction and that construction in place is in substantial compliance with the Plans and Specifications; and

(f) Fire and extended coverage with builders' risk completed value insurance coverage collapse and such other hazard insurance as the Bank may require, with acceptable mortgagee clauses in favor of the Bank, such insurance to be in such amounts, form and by such companies as shall be approved by the Bank. Such policies shall be delivered to the Bank together with evidence of payment of premiums thereon. Bank shall also be provided with comprehensive public general liability insurance protecting the Borrower and Bank in an amount acceptable to Bank and naming the Bank as an insured as its interest may appear; and

(g) A policy or binder of mortgagee title insurance satisfactory to the Bank's attorneys insuring the validity and priority of the Bank's lien.

9. This commitment and the financing are subject to the following time limitations:

(a) Construction shall commence within sixty (60) days from the date hereof and must be continued with reasonable diligence;

(b) Construction shall be completed not less than thirty (30) days prior to the maturity date of the mortgage; and

(c) The mortgage loan closing shall be held as soon as all of the conditions of this commitment have been met, but not later than sixty (60) days from the date hereof.

10. Bank shall have the right to inspect the mortgaged premises and improvements thereon at any and all reasonable times and shall have full and free access to all drawings, plans, books and records pertinent to the mortgaged premises and improvements constructed thereon.

11. So long as this loan is unpaid, Borrower hereby authorizes a representative of Bank to attend each meeting of the Board of Directors of Borrower, if a corporation, or each partner s meeting, if a partnership, and Borrower agrees to send notice of each such meeting to Bank at least fifteen (15) business days prior to each meeting together with copies of the agenda for such meetings and all documents attendant thereto which are sent to those attending each such meeting.

12. The parties hereto agree that this commitment shall survive the loan closing and that each and every one of the obligations and undertakings of Borrower and any guarantor named herein shall be continuing obligations and undertakings and shall not cease and terminate until the entire loan, together with all interest and fees due hereon and any other amounts which may accrue pursuant hereto and/or to the loan documents executed pursuant thereto, shall have been paid in full and until all obligations and undertakings of the Borrower and said guarantors shall have been fully completed and discharged.

13. The loan contemplated hereunder, as well as the mortgaged premises and the proposed and actual use thereof, must comply with all laws, statutes, ordinances, rules and regulations of all governmental authorities having jurisdiction over the same and, at the time of the loan closing and at the time of any disbursement by Bank, there must be no action or proceedings pending before any court, quasi-judicial body or administrative body or regulatory agency, relating to the validity of the mortgage loan, the mortgaged premises, or Borrower's proposed or actual use of the mortgaged premises. All rights to appeal from any decision rendered in connection with the mortgage

loan, the mortgaged premises, or proposed or actual use of the mortgaged premises must have expired prior to closing date and/or any pertinent disbursement date.

14. The buildings and all other improvements contemplated by this commitment shall be made and completed of first class materials, and in a good substantial and workmanlike manner, in accordance with the approved Plans and Specifications.

15. The validity of this commitment is subject to the accuracy of all information, representations, exhibits and other materials submitted with or in support of the application, or other data, and any change incident thereto prior to the full disbursement of mortgage funds shall, at the option of the Bank, void all obligations of the Bank under the provisions hereof.

16. If, during the term of the construction loan, you should acquire a permanent mortgage commitment, your acceptance hereof shall constitute your assignment to the Bank of any such commitment whether now existing or hereafter acquired as additional security on the construction mortgage, such assignment to be used by the Bank only in the event of default under the provisions of the construction mortgage and/or the note secured thereby. Any default or non-compliance by you with the terms and conditions of any permanent commitment now or hereafter existing respecting the mortgaged premises shall, at the option of the Bank, constitute a default hereoff.

17. Neither this commitment nor the loan proceeds shall be assignable without the prior written consent of the Bank, and any attempt at such assignment without consent shall be void.

18. By your acceptance of this commitment you acknowledge that in consideration of the issuance of this commitment by the Bank, and in consideration of the Bank holding itself ready, willing and able to make the mortgage loan as aforesaid herein, and in further consideration of the substantial services which the Bank has rendered and will be required to render in preparation for closing and in the disbursement of mortgage funds, the nonrefundable commitment fee shall be paid upon the acceptance hereof. This fee is nonrefundable regardless of whether or not the mortgage loan contemplated herein is consummated.

19. Reference herein to "mortgage" is intended in jurisdictions where appropriate to mean deed of trust.

20. Notwithstanding the place of acceptance of this commitment, or the place of execution of any of the loan documents, this commitment shall be deemed made and accepted in Newark, New Jersey, and you agree by the acceptance hereof that the validity and the interpretation of this commitment and the instrument of indebtedness, and instruments of security contemplated herein shall be governed by the laws of the State of New Jersey, unless such documents shall expressly provide otherwise.

21. Borrower agrees to protect, indemnify, defend and save harmless Bank and its directors, officers, agents and employees from and against any and all liability, expense or damage of any kind or nature and from any suits, claims or demands, including reasonable legal fees and expenses on account of any matter or thing, whether in suit or not, arising out of this commitment or in connection therewith unless said suits, claims or damages are caused by gross negligence or willful malfeasance of Bank. This obligation shall survive the closing of the loan and the repayment thereof.

22. On the occasion of each construction advance, there shall be delivered to the Bank a letter of the title company satisfactory to Bank's attorneys insuring the lien of the construction mortgage.

23. The Bank at its option may deliver at the construction site a sign for display on the project premises indicating that the Bank is providing the construction financing on the project. If such sign is provided by the Bank, Borrower agrees:

    (a) To provide a prominent and suitable location for the display of the sign;

    (b) To cause the sign to be displayed in such place by suitably affixing the sign to a structure on the site at Borrower's cost; and

    (c) To maintain the display of such sign for the duration of the construction phase of the project.

24. No change in the provisions of this commitment shall be valid and binding unless in writing, executed in the name of and by an officer of the Bank.

25. The Bank may require as a condition precedent to the initial disbursement, and to any subsequent disbursement, satisfactory evidence of the continuing availability to the project of fuel for heating purposes.

Very truly yours,

FIRST NATIONAL STATE BANK OF NEW JERSEY

By:_____
Edward L. Heil, Senior Vice President

ACCEPTED:

Borrower - Lafayette Towers

By:_____

Date:_____

PURCHASE PRICE SCHEDULE

LAFAYETTE TOWERS
PASSAIC, NEW JERSEY

Apt. A 1323 sq.ft. 2 B.R.	Apt. B 1200 sq.ft. 1 B.R.	Apt. C 900 sq.ft. 1 B.R.	Apt. D 1200 sq.ft. 1 B.R.	Apt. E 1323 sq.ft. 2 B.R.	Apt. F 1378 sq.ft. Corner 2BR.	Apt. G 1353 sq.ft. 2 B.R.	Apt. H 1140 sq.ft. Delux 1BR.	Apt. I 1353 sq.ft. 2 B.R.	Apt. J 1373 sq.ft. Corner 2 B.R.
$ 61,000	$ 55,100	$ 42,500	$ 55,100	$ 61,000	$ 63,700	$ 62,700	$ 52,200	$ 62,700	$ 63,700
61,500	55,600	43,000	55,600	61,500	64,200	63,200	52,700	63,200	64,200
62,000	56,100	43,500	56,100	62,000	64,700	63,700	53,200	63,700	64,700
62,500	56,600	44,000	56,600	62,500	65,200	64,200	53,700	64,200	65,200
63,000	57,100	44,500	57,100	63,000	65,700	64,700	54,200	64,700	65,700
63,500	57,600	45,000	57,600	63,500	66,200	65,200	54,700	65,200	66,200
64,000	58,100	45,500	58,100	64,000	66,700	65,700	55,200	65,700	66,700
64,500	58,600	46,000	58,600	64,500	67,200	66,200	55,700	66,200	67,200
65,000	59,100	46,500	59,100	65,000	67,700	66,700	56,200	66,700	67,700
65,500	59,600	47,000	59,600	65,500	68,200	67,200	56,700	67,200	68,200
66,000	61,100	47,500	61,100	66,000	68,700	67,700	57,200	67,700	68,700
66,500	61,600	48,000	61,600	66,500	69,200	68,200	57,700	68,200	69,200
$ 765,000	$ 754,200	$ 432,500	$ 754,200	$ 765,000	$ 797,400	$ 783,400	$ 659,400	$ 783,400	$ 797,400

Sell Out $ 7,313,000

Exhibit "C" - Commitment Letter

EXHIBIT "D" ATTACHED TO AFFIDAVIT OF ELIOT R. WESTON IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Letter from Robert S. Greenbaum to Richard K. Rosenberg

APR 29 1974

LAW OFFICES
GREENBAUM, GREENBAUM, ROWE & SMITH
A PROFESSIONAL CORPORATION
60 PARK PLACE
NEWARK, N. J. 07102
(201) 623-9111

ROBERT S. GREENBAUM
ARTHUR M. GREENBAUM
PAUL A. ROWE
WENDELL A. SMITH
NATHANIEL H. YOHALEM
LAWRENCE B. MINK
DAVID L. BRUCK
E. KENNETH WILLIAMS, JR
ANDREW M. KIMMEL
DAVID S. GORDON
ROBERT C. SCHACHTER
MARK H. ROCHKIND
DENNIS A. ESTIS

WOODBRIDGE OFFICE
ONE WOODBRIDGE CENTER
WOODBRIDGE, N. J. 07095
(201) 636 4450

OF COUNSEL
WM. L. GREENBAUM
HERMAN B. J. WECKSTEIN

RECEIVED
APR 25 1974
Executive Office
Newark, N.J.

April 24, 1974 Woodbridge

Richard K. Rosenberg, Esq.
Heller & Laiks
77 Passaic Avenue
Passaic, New Jersey 07055

Re: First National State Bank of New Jersey - Beranto Towers

Dear Dick:

As you must know by now, I tried to reach you this morning and this confirms the message left with your secretary.

In the above matter in which First National State Bank of New Jersey issued its commitment dated February 25, 1974, your attention is invited to the fact that the sixty day life of the commitment, by provision of the general conditions, paragraph 9(c), comes to an end on Friday, April 26, 1974.

The bank has been ready, willing and able to close the loan transaction and the sole reason for the delay is the inability of the borrower up to this point to produce the necessary surety bond required by the commitment and other matters in satisfaction thereof as discussed with Mr. Williams of this office.

COPY

ENBAUM, GREENBAUM, ROWE & SMITH

If you or your client desire an extension of the commitment beyond Friday, immediate communication should be made with Mr. Heil or Mr. Van Sant at First National State Bank of New Jersey.

Sincerely,

Robert S. Greenbaum

RSG:mtm
cc: Mr. Edward L. Heil, Senior Vice President
First National State Bank of New Jersey

CERTIFIED MAIL:
RET. REC. REQ.

EXHIBIT "E" ATTACHED TO AFFIDAVIT OF ELIOT R. WESTON IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Letter from New Jersey National Bank to Dr. George C. Peck or His Assigns

AUG 2 d 1974

NEW JERSEY NATIONAL BANK

ONE WEST STATE STREET • TRENTON, NEW JERSEY 08603 • (609) 989-7700

RICHARD SCHMALZBACH
VICE PRESIDENT

April 25, 1974

Dr. George C. Peck or His Assigns
1200 Route 46
Clifton, New Jersey

Re: Lafayette Towers Permanent Condominium
Mortgage Loans
Lafayette Avenue
Passaic, New Jersey

Dear Dr. Peck:

New Jersey Realty Mortgage Company, through New Jersey National Bank, as requested by you, will make available a total of $4,800,000 in individual permanent mortgages to purchasers of condominium units in the above property. This commitment is subject to all terms and conditions set forth below and will become effective upon your acceptance and deliverance of one copy of this letter to the undersigned by April , 1974.

Conditions Relative to Individual Owners:

1. Individual loans will not exceed 75% of the full purchase price, or adjusted sales price as approved by the bank, whichever is less, as evidenced by an executed sales contract to be delivered to New Jersey National Bank with each application for financing.

2. No loan is to exceed $40,000.

3. All loans will bear the interest rate as established from time to time by New Jersey National Bank for residential mortgages with a maximum term of 25 years. Mortgage payments shall include principal, interest, and real estate taxes.

4. Each individual application is subject to credit approval of New Jersey National Bank.

5. Each obligation is to be secured by a bond and first mortgage on the individual unit and the proportionate common area, and is to be insured as a first lien as evidenced by a title policy issued by New Jersey Realty Title Insurance Company. Prior to closing, a survey of the unit, certified by a licensed engineer, shall be submitted to New Jersey National Bank and its counsel. All mortgage documents shall shall be subject to their approval. We are to be furnished with a certified copy of the Master Insurance Policy, which policy shall contain a clause that the building and improvements shall be insured in an amount equal to the maximum insurable replacement value, and New Jersey National Bank as mortgagee as to each loan closed.

6. A Condominium Betterments Insurance Endorsement shall be furnished as to each individual unit, insuring the ownership betterments of the Borrower and with mortgagee clause endorsements.

7. Each mortgage will contain a prepayment clause as prescribed by New Jersey Statutes. The mortgage shall become due and payable upon the transfer of ownership of any unit without the express written consent of New Jersey National Bank.

8. Each Purchaser shall pay all closing fees in addition to necessary amounts to establish a tax escrow account.

9. All owners of dwelling units will be required to sign an agreement and there will be a provision in the loan documents that any default in compliance with the charter, by laws and regulations of the condominium, or payment of the common charges and assessments, shall constitute an item of default under the loan documents.

10. We shall not be obligated to provide more than 120 individual condominium loans.

General Conditions:

1. We shall have the right to approve of the assignment of this commitment to your entity to be furnished, but any assignment shall not relieve you of any of your obligations under this commitment.

2. The properties to be mortgaged are located at 180 Lafayette Avenue, Passaic, New Jersey, composed of a 14-story high-rise condominium, to be built, containing 120 units, including office space and related parking and recreational facilities.

BEST COPY AVAILABLE

3. New Jersey National Bank shall not be obligated to close any individual mortgage loans until bona fide contracts for the purchase of the condominium units are first presented to New Jersey National Bank. Said contracts shall be accompanied by deposit moneys of not less that 10% of the purchase price, which deposit moneys shall be held in a separate trust account until closing of title.

4. Acceptance of this commitment by you shall be accompanied by your note in the sum of $48,000. You shall further pay the sum of $9,600 commencing 30 days subsequent to the closing of the construction loan and a like sum each month thereafter until this additional commitment fee equals the sum of $48,000. In the event that at any time during this five-month period, you obtain permanent financing from another source, then upon the delivery to New Jersey Realty Mortgage Company and New Jersey National Bank of a bona fide acceptable permanent commitment, you shall not be obligated to make any further payments under this provision. In the event that your permanent commitment is for less than the total amount of this commitment, the deferred fees required by this paragraph shall be pro rated and proportioned between the amount of this commitment and the amount of your permanent loan commitment. These deferred fees payable at the rate of $9,600 per month shall be the only fees refunded under this paragraph. All fees set forth in this paragraph shall be considered earned on your acceptance of this commitment, but at our option payment may be paid at the closing of the construction loan.

5. Your attorney shall provide us with an opinion that this condominium is exempt from registration under the Securities Act of 1933 and the Securities Act of the State of New Jersey.

6. This commitment is issued on condition that you will proceed promptly to subject the project premises to the Condominium Act of the State of New Jersey and to procure the necessary approval and consents of local municipal authorities. All documents relating thereto shall be submitted to New Jersey Realty Mortgage Company and New Jersey National Bank for approval, including, among other things, the terms and conditions of the proposed Offering Plan, Subscription Agreement, Declaration of Condominium, regulatory agreements, filed floor plans, charter and by-laws, and any other documents in connection with such condominium. All such documents involved in the condominium shall be with the express approval of our counsel and the insuring title company. It is understood and agreed that the Offering Plan shall conform to the requirements of the Attorney General of the State of New York for his approval in the event that the condominium is to be offered for sale to the residents of the State of New York.

7. This commitment shall be subject to rules and regulations governing the New Jersey Realty Mortgage Company and the New Jersey National Bank and to all governmental laws, rules and regulations now or hereafter affecting the improvements or the financing thereof as herein contemplated.

8. New Jersey National Bank and New Jersey Realty Mortgage Company reserve the right to approve of the general contractor and the bonds of the major contractors.

9. This commitment shall be valid for a period of 18 months commencing with the date on which the construction loan closes. In the event you desire an extension of this commitment, subject to our sole discretion and at our option, we may extend same upon your payment to us of an extension fee based upon 1% of $40,000 times the remaining units which are not closed at the expiration of said 18-month period. Said extension shall in no circumstance exceed six months from the expiration of the initial eighteen month period.

10. Upon the acceptance of this commitment you shall deposit with New Jersey National Bank a refundable commitment fee of $360,000. This fee shall be considered earned upon the execution of this commitment by you. For your convience we will accept the sum of $150,000 on closing of the construction loan and you shall pay the balance in 7 equal monthly installments of $30,000 each commencing on the 30th day of the month following the construction loan closing until said sum is paid in full. This refundable fee shall be returned to you at the rate of $3,000 per unit closed without our providing the permanent financing under this commitment. Your right to the refund is conditioned upon your delivery to us of a copy of the recorded deed to a purchaser and proof that the sale was for cash or permanent financing was provided by a long term lender other than New Jersey National Bank.

If at any time during the term of this commitment you substitute permanent commitment in whole or in part, acceptable to New Jersey National Bank and New Jersey Mortgage Company, but subject to the terms and conditions of the construction loan and its commitment you shall be entitled to a refund of that proportion of the refundable fee, based upon the number of units for which other permanent financing has been committed at the rate of $3,000, per unit.

11. This commitment shall not be valid and shall be of no force or effect unless the construction loan granted to you by New Jersey National Bank and New Jersey Realty Mortgage Company is closed prior to June 3, 1974.

12. Any breach of the construction commitment or mortgage documents not cured in accordance with the terms of those documents shall create an automatic default of this commitment and this commitment shall be void.

If the above terms and conditions are satisfactory, please sign and return two copies of this agreement by April 20, 1974.

Very truly yours,
NEW JERSEY NATIONAL BANK

R. Schmalzbach
Vice President

ACCEPTED AND APPROVED

George C. Peck

EXHIBIT "F" ATTACHED TO AFFIDAVIT OF ELIOT R. WESTON IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Commitment Letter New Jersey Realty Mortgage Company to Dr. George C. Peck or His Assigns

New Jersey Realty Group

NJR

NEW JERSEY REALTY MORTGAGE COMPANY
830 BROAD STREET, NEWARK, NEW JERSEY 07101
AREA 201 • 623-4305

April 25, 1974

Dr. George C. Peck or His Assigns
1200 Route 46
Clinton, New Jersey

Re: Lafayette Towers
180 Lafayette Avenue
Passaic, New Jersey

Dear Dr. Peck:

The undersigned, New Jersey Realty Mortgage Company, sometimes herein referred to as "Mortgagee," hereby commits itself to make or cause to be made a First Mortgage Loan (hereinafter the "Construction Loan") upon the following terms and conditions and subject to your acceptance thereof and compliance therewith:

1. MORTGAGE PREMISES. In addition to the joint and several obligations evidenced by your Note, the Construction Loan shall be made upon the security of a First Mortgage on the following described premises (hereinafter the "Premises") and all present or future appurtenances therein:

180 Lafayette Avenue, Passaic, New Jersey
14-story precast concrete, masonry hi-rise
120 unit condominium building

A final legal description of the above premises shall be inserted in the Mortgage in accordance with the title policy issued as hereinafter provided.

2. NOTE. The Note evidencing the Construction Loan shall be executed by Dr. George C. Peck and shall constitute the personal obligation of Dr. George C. Peck, Catherine M. Peck, and all other general partners and their wives. The same parties shall have personal liability for the payment of the fees as set forth herein.

2:01. INTEREST. Interest at the rate of three (3) percent over the prime rate charged by New Jersey National Bank, per annum, from time to time with the understanding that a minimum interest rate of 11.25% will be charged in the event the prime rate of New Jersey National Bank should fall below 8½%; and shall be payable

monthly on the sums advanced. Any change in the prime commercial lending rate of New Jersey National Bank shall take immediate effect with respect to the interest payable on this loan.

2:02. TERM. The overall construction loan of $4,750,000 shall have a term ending 12 months from the date of closing, with two 6-month extensions with an additional extension fee of one (1) percent for each six (6) month extension.

3. AMOUNT. The total amount of the Construction Loan for which this commitment is made is FOUR MILLION, SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($4,750,000). This loan, while it is in the name of the New Jersey Realty Mortgage Company and while this commitment is being granted by this lending institution, recognizes participation as follows:

a. $3,000,000 - New Jersey National Bank

b. $1,750,000 - New Jersey Realty Mortgage Company

4. The following general conditions shall apply:

4:01. TITLE INSURANCE. All mortgages provided for and designated in this commitment shall be first liens upon marketable fee simple title satisfactory to the Mortgagee and shall be so insured at your cost by New Jersey Realty Title Insurance Company by policies of title insurance so insuring the Mortgagee's interest and the title policy shall be in the amount of $4,750,000. If satisfactory title is not certified, our obligations under this commitment shall terminate. New Jersey Realty Title Insurance Company will issue title binders and close all individual units as well.

4:01.1. SURVEY. A survey and licensed surveyor's certificate dated not more than six (6) months prior to the date hereof and shall be furnished to us prior to closing. The survey shall show the dimensions and total square foot area of the plot, interior lot line, if any, the dimensions and location of all improvements, parking areas and easements and the location of adjoining streets and the distance to and name of the nearest intersecting street. An updated survey shall be furnished at the Mortgagee's request as construction progresses, without cost to us.

4:02. PLANS. Detailed plans and specifications covering all phases of construction must be submitted prior to closing, and will be subject to approval by our Architect and Engineer. All construction must be done and completed in accordance with such approved plans and specifications. Undersigned or his representatives shall have the right to inspect all such construction periodically. Our Engineer and Architect is to certify as to the structal stability of the building prior to closing. Your architect shall certify before each construction advance as to the work in-place and that same is in accordance with the plans and specifications.

4:03. TAXES AND LIENS DURING CONSTRUCTION. During the period of construction, no disbursement of construction monies will be made until all unmatured assessments and unpaid taxes are paid and all liens removed or insured against by the title company.

4:04. PREPAYMENT OF TAXES. The undersigned shall require that the Mortgage contain a provision to the effect that there shall be added to each interest payment, as provided in Paragraph 2:01 an amount sufficient to permit the undersigned to pay, at least 30 days before they become due, all taxes, assessments and other similar charges against the Premises. Such additional payments may be comingled with funds of the undersigned and no interest shall be payable in respect thereof.

4:05. INSURANCE. Flood insurance, fire insurance with extended coverage and builder's risk insurance covering malicious mischief, vandalism and theft, in form, amounts and with carriers satisfactory to the Mortgagee must be effected. Such insurance shall be placed on both building and on the equipment used in the construction of and operation of said buildings and present at closing.

4:06. DOCUMENTS. All documents and papers required to effect the closing of the Mortgage must be in form and content satisfactory to the Mortgagee. Dr. George C. Peck shall execute all required documents and papers.

4:06.1. SIGNS. Mortgagee shall be permitted to erect during construction a sign on the property to be mortgaged indication the source of the long term financing and construction financing.

4:07. FINANCING STATEMENTS. You shall be required to maintain the Financing Statements filed with the Secretary of State and the Clerk of Passaic County, covering the fixtures, chattels and other items to be contained in the various buildings.

4:08. COSTS. You shall pay at the closing of this transaction all reasonable and necessary expenses and charges incurred in connection with the making of the Mortgage Loan, including charges for title fees and disbursements of your counsel, architect and engineer fees, recording and filing fees, costs of fire and extended coverage insurance and property transfer tax, as required. The attorneys for New Jersey Realty Mortgage Co. and New Jersey National Bank will review all condominium documents and the expenses for this service will be the responsibility of the Borrowers.

5. ACCEPTANCE. If you fail to accept this commitment by April 25, 1974, the undersigned may, at its option, withdraw and terminate this commitment.

5:01. CONSTRUCTION START. The undersigned acknowledges that the construction of the project is partially completed and construction must commence within 30 days from the date hereof in accordance with the approved plans and specifications, as provided in Paragraph 4:02. Failure to comply shall constitute a default under this commitment.

Construction thereafter must be diligently pursued, except for circumstances beyond your control, or the undersigned may at its option withdraw and terminate this commitment.

6. SECURITY AGREEMENTS. The mortgage referred to herein shall also be considered a Security Agreement covering all of the fixtures, chattels, and other items contained or to be contained in the various buildings. You shall not be permitted, at any time, to have any outstanding security agreements with any other person, firm or corporation. A violation of this shall cause a default in the mortgage and a convenant to this effect shall be contained in said mortgage.

6:01. CLOSING. Five (5) days prior to closing the Mortgagee shall be furnished the original title binder and survey as aforesaid for review. The closing of this mortgage loan shall take place at the office of New Jersey Realty Mortgage Company, 830 Broad Street, Newark, New Jersey, at which time and place you shall produce a title binder run to the date of closing and insuring the interest of the mortgagee for the face amount of the mortgage.

6:02. CONSTRUCTION COMPLETION. All construction required under the plans and specifications for this commitment shall be completed on or before April 30, 1975 (including any grading, seeding and landscaping and all other on-site and off-site improvements). We shall require the issuance of final certificates of occupancy from the Municipality and State prior to the final disoursement.

7. ADDITIONAL TERMS. In addition to any other conditions required by the plans and specifications, the following shall apply:

7:01. DEPARTMENT OF COMMUNITY AFFAIRS. You must obtain and submit to us evidence of approval of your plans and specifications by the Department of Community Affairs in accordance with the provisions of P. L. 1967, Chapter 76.

7:01.1. COMPLIANCE. At all times you shall comply with all rules, regulations and statutes of any governmental body, authority or agency having jurisdiction. Failure to cure any violation with five (5) days of notice thereof shall be construed to be a default in the mortgage and a covenant to this effect shall be part of the mortgage document.

7:02. NO CONVEYANCE. You shall not convey all or any interest in the Premises between the date of accepting this commitment and the execution and delivery of the Note and Mortgage. During the course of construction and until at least after the purchase of the loan by the Permanent Lender, the borrower shall be the same entity to whom this commitment is addressed. Any violation of this provision will result in immediate forfeiture and cancellation of this commitment.

7:03. SPECIAL PROVISIONS. Prior to the disbursement of any sums, you shall submit building permits from the State and Municipal, as applicable, written clearance from the Department of Environmental Protection, indicating that the proposed construction does not violate any outstanding Order, Rules or Regulations of that Department or would in any other way be subject to injuctive restraint by the Department for ecological or environmental reason. Also sewer permits from the Municipal permitting tie in to the sewer system and a letter from appropriate governmental agency as to the adequancy of water.

8. LATE PAYMENT CHARGE. Interest herein shall be paid monthly on the first day of each and every month. If during construction such payment is not received by the 15th day of any month, then a late charge of 5 (five) percent of the overdue payment may be assessed. If the late charges are not paid, it shall be added to the next payment due. Construction advances are to be withheld until all payments and any late payment charges are paid.

9. NO ADVERSE CHANGE. At the time of your application for the Mortgage Loan, you represented to us certain facts, including your financial standing and credit. If, at the time of final disbursement, you are involved in any bankruptcy reorganization and insolvency proceeding, then the undersigned may, at its option, declare the Mortgage in default and institute foreclosure proceedings.

10. MORTGAGE PLACEMENT FEE. In consideration of New Jersey Realty Mortgage Company placing this mortgage, you agree to pay the sum of $95,000, two percent (2%), which sum shall be due and payable upon your acceptance of this commitment. For your convenience we shall postpone the payment of the said fee to the date of the first construction advance. We shall require a 25% pre-sale contingency before the first construction disbursement can be effected. A pre-sale contract is defined as an executed sales agreement, indicating a specific apartment unit at a specific purchase price, with a non-refundable deposit of not less than $1,000 and a non-binding mortgage application to be filled out by the prospective purchaser at the time the pre-sale agreement is executed.

11. The approval of the general contractors and of the bonding of the major sub-contractors will be subject to approval of the Mortgagee.

12. RELEASE. The Mortgage will provide for the release from the lien of the mortgage of each respective condominium unit, together with the appurtenant undivided percentage interest in the common elements, upon payment of 90% of the actual sales price of each individual unit or $45,000, whichever is the greater, which sum shall be applied to the reduction of the principal sum of $4,750,000 until said sum is paid in full, whereupon any remaining units will be free of the lien of the Mortgage.

13. MASTER DEED. The Master Deed for Condominium and Declaration of Condominium shall not be recorded until 51% of the sales contracts have been executed and established to our satisfaction and until you supply us with written evidence from you counsel that the said documents have been properly and duly prepared and that we shall have the right to review and approve such documents.

14. The commitment of New Jersey National Bank dated April 25, 1974 for individual permanent mortgages in the total amount of $4,800,000 is incorporated herein by reference as if set forth at length and made a part hereof. All terms and conditions of the New Jersey National Bank commitment shall be observed by you and your failure to observe and comply with any conditions may, at the option of the undersigned, constitute a default under this commitment and shall permit the undersigned to either (a) refuse to advance construction funds; (b) desist from advancing further construction funds until such default is cured; or (c) if said default is not cured within 30 days, the undersigned may, at its option, institute foreclosure under its construction mortgage loan and said construction mortgage loan shall so provide. The undersigned shall not be obligated to make any disbursements until all contingencies and conditions of the New Jersey National Bank commitment which are conditions precedent to making the New Jersey National Bank commitment operative have been met.

15. If you fail to pay the note and mortgage when due under the terms of this commitment or any extension thereof, then you further agree to pay an additional sum of 1% per month of the face amount of the note for each month that the loan remains unpaid. This provision shall not be considered a waiver of any and all rights of the Mortgagee to foreclose the mortgage or protect its security and said sum shall be added to and become part of the balance due on said note and mortgage and shall be payable to us on demand.

The terms of this commitment letter may not be altered, changed or amended, except by writing. This commitment may not be otherwise assigned without the written consent of the undersigned, except as set forth herein. All executory provisions of this commitment shall survive delivery and execution of the Construction Mortgage hereinabove described and shall remain in full force and effect. This commitment shall not be assignable by you to any person, firm or corporation and title to the entire tract shall remain in you until this mortgage is paid in full, except as set forth herein. Anything contained in this commitment that is not included in the mortgage documents shall survive the closing of the mortgage loan.

Exhibit "F" - Commitment Letter N.J. Realty Mortgage Company to Peck

If the foregoing is acceptable, please sign and date the enclosed copy of this commitment letter agreement; whereupon you shall be bound to accept, and the undersigned shall be bound to make, the proposed mortgage loan on the terms and conditions hereinabove set forth. Failure to accept this commitment within the time limit set forth above shall give the undersigned the option to withdraw and terminate same.

Very truly yours,

NEW JERSEY REALTY MORTGAGE COMPANY

By _____

By _____

This commitment and all of its terms and conditions is hereby accepted on April 30, 1974.

By _____
George C. Peck

THE FOREGOINGS APPROVED BY NEW JERSEY NATIONAL BANK.

By _____
Richard Schmalzbach
Vice President

1 Copies Received

Date July 8, 1976

Firm Kane & Speckes Sys.

By [illegible]